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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

YSLETA DEL SUR PUEBLO,
Petitioner,

v.

STATE OF TEXAS and ANN RICHARDS,
GOVERNOR OF THE STATE OF TEXAS,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Fifth Circuit err in its decision (which conflicts with holdings of the First and Tenth Circuits) that the Indian Gaming Regulatory Act is not the controlling federal law governing gaming on Indian land, thereby discriminating among federally recognized Indian tribes?

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STATE OF TEXAS and ANN RICHARDS,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the Ysleta del Sur Pueblo ("Tribe"), seeks certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit which held, in conflict with the decisions of two sister courts of appeals, that the Indian Gaming Regulatory Act ("IGRA"), 18 U.S.C. § 1166 et seq. and 25 U.S.C. § 2701 et seq., does not govern gaming on Indian lands to the exclusion of prior statutory schemes. The First Circuit in *Rhode Island v. Narragansett Tribe of Indians*, 19 F.3d 685 (1st Cir.), cert. denied, —— U.S. ——, 115 S. Ct. 298 (1994), ruled that IGRA implicitly repealed a grant of complete jurisdiction to the state of Rhode

Island with respect to matters covered by IGRA. The Tenth Circuit in *United Keetoowah Band of Cherokee Indians v. Oklahoma,* 927 F.2d 1170 (10th Cir. 1991), ruled that IGRA bars federal assimilation of state gaming laws except as provided in IGRA. See 18 U.S.C. § 1166 (a). The decision of the Fifth Circuit impacts every Indian tribe by vitiating the national policy that IGRA is to be the exclusive vehicle for regulating Indian gaming (hence, its name).

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 36 F.3d 1325 (5th Cir. 1994). Appendix at 1a to 21a. The district court's order granting summary judgment for the Ysleta del Sur Pueblo is reported at 852 F. Supp. 587 (W.D. Tex. 1993). Appendix at 22a to 43a. The order of the United States District Court for the Western District of Texas denying the State of Texas' motion to dismiss is not reported. Appendix at 44a.

STATEMENT OF JURISDICTION

The opinion of the Fifth Circuit was entered on October 24, 1994. The Tribe's petition for rehearing was denied on November 21, 1994. Appendix at 44a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

There are numerous lengthy constitutional and statutory provisions involved in this case. They are listed here and set forth in their entirety at 45a to 60a in the Appendix: U.S. Const. art. I, § 8, cl. 3; U.S. Const. amend. XI; 18 U.S.C. § 1166; 25 U.S.C. § 1300g-2(a)-(c); § 1300g-4(a), (f); and § 1300g-6; 25 U.S.C. § 2701; § 2702; § 2703(5), (6), (7)(a)(b), and (8); and § 2710(d)(1); and Pub. L. 90-287, 82 Stat. 93 (1968).

STATEMENT OF THE CASE

The Petitioner Ysleta del Sur Pueblo is a federally recognized Indian tribe whose 66-acre reservation is located near El Paso, Texas. There are approximately 1,300 tribal members, most of whom are impoverished.[1]

In 1968 the United States recognized the Tiwa Indians of the Ysleta del Sur Pueblo as an Indian tribe and at the same time transferred its trust responsibilities for the Tribe to the State of Texas. Tiwa Indians Act, Pub. L. No. 90-287, 82 Stat. 93 (1968).

In 1983, the United States and the Tribe initiated steps to restore federal trust status to the Tribe. In 1987, Congress passed the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Trbes of Texas Restoration Act ("Restoration Act"). 25 U.S.C. §§ 1300g *et seq.*[2] The Restoration Act, a general act that restored trust responsibilities to the United States, granted the State of Texas Public Law 280 jurisdiction over the Tribe.

The original draft of the Restoration Act had no provisions dealing with gaming. The House amended the bill to make the Tribal gaming laws and regulations "identical" with those of Texas; however, it also provided a means for the Tribe to conduct gaming different from Texas law. Appendix at 3a to 6a. The Senate amended the bill further to prohibit all gaming on Tribal land, even if the same gaming was permitted to others in Texas. Appendix at 6a. The bill died in Congress, but was re-introduced in the House the following year and once again included a complete ban on gaming. Appendix at 6a. The Senate amended the gaming provision to remove the ban and have the legislation read in its present form. Appendix

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[1] A March 1993 income analysis of tribal members indicated that 68% of the heads of households had less than $15,000 in annual income, with 16% earning less than $5,000 annually.

[2] The Restoration Act changed the name of the Tiwa Indians to the Ysleta del Sur Pueblo. 25 U.S.C. § 1300g-1.

at 7a. The House concurred. Appendix at 7a. The only extant legislative history concerning the House concurrence is the statement, made immediately before the vote in August 1987, by Congressman Udall, Chairman of the House Committee responsible for Indian affairs. Chairman Udall stated that the Act codified this Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which was decided just six months prior to the passage of the Restoration Act. Appendix at 17a to 18a.

The following year, Congress codified and extended *Cabazon* to non-Public Law 280 tribes and created a specific nationwide federal regulatory system governing gaming on Indian land, known as the Indian Gaming Regulatory Act ("IGRA"), P.L. 100-497 (100th Cong., Oct. 17, 1988) codified at 25 U.S.C. §§ 2701 et seq. and 18 U.S.C. § 1166 et seq.) Class III gaming [3] on Indian land is lawful if authorized by a tribe located in a state that "permits such gaming for any purpose by any person, organization or entity," and if "conducted in conformance with a Tribal-State compact entered into by the Indian tribe." 25 U.S.C. § 2701(d)(1).

After attempting to engage the governor of Texas in negotiations for more than a year, the Tribe, in 1993, sued the State of Texas and, in the alternative, its governor. The Tribe sought a declaration that the State had failed to negotiate in good faith for a compact, and for an order granting the Tribe the specific remedies provided in IGRA. The relief was sought pursuant to IGRA, 25 U.S.C. § 2710(d)(7), as well as 28 U.S.C. §§ 2201 and 2202 dealing with declaratory judgments. The jurisdictional bases for the Tribe's complaint were 25 U.S.C. § 2710(d)(7), and 28 U.S.C. §§ 1331 and 1362.

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[3] IGRA divides gaming into three classes. Class III gaming is gaming that is neither social or traditional Class I gaming, nor within the various bingo, pull tab, and card games which are authorized as Class II gaming under the statute. See 25 U.S.C. § 2703(6), (7) and (8).

The State of Texas and its governor moved to dismiss the complaint, claiming, *inter alia,* that the Tenth and Eleventh Amendments barred suit. The district court denied the motion. In cross-motions for summary judgment, the parties raised the issues of whether Texas law permitted the proposed gaming activities and whether the Restoration Act prohibited gaming activities on the Tribe's reservation.

The district court granted summary judgment for the Tribe, holding that the Tribe's proposed gaming activities were permitted under Texas law and thus were a proper subject for the tribal-state negotiations contemplated by IGRA. The court also concluded that the Tribe's gaming activities were "permitted" and were thus not "prohibited" by the Restoration Act.

The State of Texas and its governor appealed to the Fifth Circuit.

The Fifth Circuit held that the Restoration Act, not IGRA, governed gaming by the Tribe. The court also concluded that the Restoration Act did not abrogate the State's Eleventh Amendment immunity and dismissed the Tribe's suit for lack of federal jurisdiction.

Prior to the Fifth Circuit's ruling, the Tribe, in good faith and with full knowledge of the State of Texas, commenced Class II gaming activities on its lands. Class II gaming activities are conducted by the Tribe under the auspices of the National Indian Gaming Commission ("NIGC"), the federal regulatory body created by IGRA. Texas was aware of and did not object to NIGC oversight of the Tribe's Class II gaming activities. The State participated in activities necessary for the NIGC to approve the Class II management agreement. The State also offered to negotiate a compact pursuant to IGRA for Class III lottery and pari-mutuel racing.

ARGUMENT

THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE FIRST CIRCUIT IN *RHODE ISLAND v. NARRAGANSETT TRIBE OF INDIANS*, 19 F.3d 685 (1st CIR.), *CERT. DENIED*, —— U.S. ——, 115 S. CT. 298 (1994), AND THE TENTH CIRCUIT IN *UNITED KEETOOWAH BAND OF CHEROKEE INDIANS v. OKLAHOMA*, 927 F.2d 1170 (10th CIR. 1991), AND RAISES THE IMPORTANT QUESTION THAT NEEDS TO BE SETTLED BY THIS COURT WHETHER THE INDIAN GAMING REGULATORY ACT IS APPLICABLE TO ALL INDIAN TRIBES AS THE NATIONAL POLICY ON INDIAN GAMING.

The effect of the decision of the Fifth Circuit specifically denies two of the three Indian tribes in Texas the benefits of IGRA, which Congress intended to exclusively govern gaming by all Indian tribes, and fractures the federal regulatory scheme governing Indian gaming. Congress intended IGRA to be the exclusive vehicle for the regulation of gaming by Indian tribes. "The purpose of [IGRA] is to provide a statutory basis for the operation of gaming by Indian tribes." 25 U.S.C. § 2701(1). IGRA establishes a "framework for the regulation of gaming activities on Indian lands which provides that in the exercise of its sovereign rights, unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities." S.Rep.No. 446, 100th Cong., 2d Sess. 5-6, reprinted in 1988 U.S.C.C.A.N. 3071, 3075 ("Senate Report"). "The mechanism for facilitating the unusal relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of state laws to activities conducted on Indian land is the Tribal-State compact." Senate Report at 6, U.S.C.C.A.N. at 3075-3076. IGRA establishes the national policy on Indian gaming.

This Court, in *Cabazon*, established the scope of permissible gaming allowed a tribe in a Public Law 280 state:

that which is not against the public policy of the state. The holding of this Court is premised on the finding that Public Law 280 states lack civil regulatory jurisdiction over activities on Indian lands. Thereafter, Congress enacted IGRA to give general effect to the *Cabazon* decision and to create additional regulatory controls over Indian gaming. IGRA was therefore specifically designed to be compatible with "Public Law 280" statutes, such as the Restoration Act. Texas is, in effect, a Public Law 280 state. Restoration Act section 1300g-4(f) is the specific grant of Public Law 280 jurisdiction. Congress said that section 1300g-6(b), dealing with gaming, "is a restatement of the law as provided in [Public Law 280]." S.Rep. No. 90, 100th Cong., 1st Sess. 10 (1987). This Court has universally treated claims of state jurisdiction by Public Law 280 states in a like manner. *Bryan v. Itasca County,* 426 U.S. 373 (1976). The Fifth Circuit ignores this Court's opinion in *Cabazon* and its application to Public Law 280 states.

In this case the Tribe argued that its proposed Class III gaming activities were permitted (or not prohibited) by Texas law under either IGRA or the Restoration Act: i.e., not against public policy. The Fifth Circuit did not resolve this issue. Instead, it found that IGRA simply did not apply to the Tribe, period, and that there was no federal jurisdiction under the Restoration Act to force the negotiation of a tribal-state compact.

On their face, the Restoration Act and IGRA do not conflict and are designed to work in conjunction with each other. IGRA creates a regulatory structure and limit on tribal sovereignty. The Restoration Act does not purport to set up a regulatory system. Indeed, it prohibits Texas, under § 1300g-6(b), from imposing its regulations on the Tribe: "Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas."

The Restoration Act provides for civil penalties under § 1300g-6(a), but so does IGRA under § 1166(a): "[F]or purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gaming, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State." Both IGRA and the Restoration Act provide these civil penalties can be enforced only in federal district court.

The Fifth Circuit construed section 1300g-6 as creating an entirely new regulatory scheme. A more reasonable interpretation is that this section of the Restoration Act was added to allow Texas the right to seek a civil injunction in federal court for violations of gaming laws on Indian land, a right not normally given to Public Law 280 states.

Not only does common sense draw no distinction between "permit" and "not prohibited," but this Court articulated this principle in *Cabazon*:

> [I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub.L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State's public policy.

Id. at 211. IGRA (with its "permitted for any purpose by any person" language) in § 2710(d)(1)(B) codifies *Cabazon*. *Cabazon* relied upon a criminal-prohibitory/civil-regulatory distinction. The Restoration Act in § 1300g-6(a) relies on "prohibited" language, which Congressman Udall explicitly referred to as the codification of *Cabazon*.

The Fifth Circuit grossly departs from the methodology set out by this Court for construing statutes, creating an

unnecessary conflict between circuits and fracturing the national, federal regulatory scheme, thus resulting in a bizarre and discriminatory outcome. As demonstrated above, there is nothing in the plain language of either the Restoration Act or IGRA to suggest a conflict.

As recognized by the First Circuit in Narragansett, "[i]n the game of statutory interpretation, statutory language is the ultimate trump card." *Narragansett,* at 699. When "a statute's text is encompassing, clear on its face, and productive of a plausible result, it is unnecessary to search for a different, contradictory meaning in the legislative record." *Narragansett,* at 608 (citations omitted). The Tribe demonstrated that the Restoration Act is in harmony with IGRA: "prohibited" means against public policy, i.e., forbidden, not just regulated. *See Black's Law Dictionary,* 5th ed. (West 1979). If a gaming activity is permitted under IGRA (i.e., not against the public policy of a state, *see* Senate Report at 6, U.S.C.C.A.N. at 3076), it is not prohibited under the Restoration Act; if not permitted under IGRA, then it is prohibited by the Restoration Act. Thus, the scope of gaming under either statute is limited only by the public policy concerns of the state. The decision of the Fifth Circuit totally ignores the fact that every form of gaming, except video lottery terminals and sports betting, is permitted to the State of Texas.

The Tribe also contended that "prohibit" should be construed in light of *Cabazon.* The Fifth Circuit's determination that *Cabazon* does not apply to the Restoration Act is based on a selective look at the Act's legislative history. The Fifth Circuit severely discounted the remarks of Congressman Udall. Appendix at 18a. Although, the overarching rule is that "statements by individual legislators should not be given controlling effect;" such statements are to be respected to the extent that they "are consistent with the statutory language." *Narrangansett,* at 699, quoting *Brock v. Pierce County,* 476 U.S. 253 (1986). The statements are especially deserving of respect when

made after the bill achieves its final form. See *Regan v. Wald*, 468 U.S. 222, 237 (1984).

Unlike the statements by the legislators described in *Narragansett*,[4] which were made before final amendments and were inconsistent with the final version of IGRA, in this case Congressman Udall's statement, made after the Restoration Act was in its final form, is the only legislative history that is completely consistent with the plain language of the statute.

The Fifth Circuit instead construed the Restoration Act to assimilate the gaming laws and regulations of Texas without regard to public policy. This construction departed from this Court's methodology. Well-settled rules of statutory construction were ignored or misapprehended by the Fifth Circuit. When two federal statutes touch upon the same subject matter, courts must strive to give effect to both if possible. *Narragansett*, at 699. If a conflict between statutes exists, the most recent enactment controls. *Id.*, at 703, 704. In the event of a conflict, specific statutes prevail over more general statutes. *Id.*, at 704 n.21. Any ambiguities should be strictly construed in favor of Tribal sovereignty. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586-587 (1977). The Fifth Circuit found its construction of the Restoration Act to be fundamentally at odds with the concepts of IGRA. Appendix at 18a to 19a. It then held that the Restoration Act controls.

The Fifth Circuit is alone and at odds with other circuit courts that have held that IGRA is the specific statute governing gaming on Indian lands and that IGRA repealed, by implication, any earlier-enacted, conflicting federal laws that, directly or indirectly, touched upon the issue of gaming on Indian land. The First Circuit held

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[4] **The two senators from Rhode Island had been assured on the Senate floor that recent amendments to the bill that eventually became IGRA did not repeal any provision of the Rhode Island Indian Claims Settlement Act.**

IGRA is the controlling law governing gaming by Indian tribes. *Rhode Island v. Narragansett Indian Tribe, supra.* The court held that IGRA's grant of jurisdiction over gaming to Indian tribes impliedly repealed a prior, tribe-specific federal statute to the extent that the prior statute granted such jurisdiction to the state.

The federal statute at issue in *Narragansett* was the Rhode Island Indian Claims Settlement Act of 1978 ("Settlement Act"), 25 U.S.C. §§ 1701-1716. Under the Settlement Act, the settlement lands were subject to not only the civil and criminal laws, but also the regulations of Rhode Island. 19 F.3d at 694-96. By comparison, in the Restoration Act there is a limited grant of Public Law 280 jurisdiction and, therefore, there is no conflict between IGRA and the Restoration Act. The First Circuit held that the Settlement Act and IGRA were "partially but not wholly repugnant."[5] *Id.*, at 704. Under the Settlement Act class III gaming was subject to state regulation.

Even in the face of a direct conflict between the Settlement Act and IGRA with regard to class III gaming, the First Circuit, applying an implied repeal analysis, ruled that IGRA prevailed:

> "[I]f the two [acts] are repugnant in any of their provisions, *the latter act without any repealing clause, operates to the extent of the repugnancy as a repeal of the first.*" Even absent outright repugnancy, a repeal may be implied in cases where the later statute covers the entire subject "and embraces new provisions, plainly showing that it was intended as a substitute for the first act."

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[5] Specifically, the court concluded that it was only with respect to Class I and Class II gaming that IGRA repealed the state's jurisdiction over the settlement lands. State jurisdiction over Class III gaming remained viable, but was limited to the tribal state compact process. *Id.*

Id., at 703-04 (emphasis added; internal citations omitted), quoting *United States v. Tynen*, 78 U.S. (11 Wall.) 88, 92 (1871)).

Again, there is no conflict in this case, because the Restoration Act specifically denies the State of Texas any regulatory jurisdiction: "Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." 25 U.S.C. § 1300g-6(b). The First Circuit did not resolve the state's argument that the Settlement Act should prevail as the more specific statute. The court did, however, indicate disagreement with the state's position: "There are two cracks at this palladium. . . . [I]t is arguable which statute is the more specific." 19 F.3d at 704 n.21. The Fifth Circuit mischaracterized IGRA as a general statute and the Restoration Act as the specific statute dealing with Indian gaming in the State of Texas.

The case of *United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1770 (10th Cir. 1991), like this case, involves the federal assimilation of state law. The Tenth Circuit held that IGRA bars federal courts from enjoining high stakes bingo played on Indian lands by application of state law through the Assimilative Crimes Act (ACA). 18 U.S.C. § 13. *Id.* at 1176. The court noted that IGRA's penal provision, 18 U.S.C. § 1166, like that of the ACA, assimilates state laws as the federal law governing all non-conforming gambling in Indian country, but that the assimilation is wider in scope than the ACA. It further noted that IGRA most differed from the ACA in that the power to enforce the assimilated laws rested solely with the United States. The Fifth Circuit held that the enforcement procedures of the Restoration Act were fundamentally at odds with IGRA without even considering the existence of § 1166 and its similarity to the provisions of the Restoration Act. See 25 U.S.C. § 1300g-6(a).

The Tenth Circuit determined that IGRA's grant of prosecutorial jurisdiction over Indian gaming to the United States differed from the ACA, which allowed a state to impose, on its own behalf, criminal sanctions against allegedly unlawful gaming activities. *Id.*, at 1177. (In much the same way the State of Texas may seek a civil injunction under the Restoration Act, but has no enforcement role under IGRA). Having identified this "conflict," however, the court concluded that Congress did not intend to repeal the ACA by enacting IGRA, but instead sought to circumscribe the use of the ACA by states against Indian gaming. *Id.*, at 1180. The court observed, however, that even under an implied repeal analysis, IGRA would control:

> Even were the ACA given continued substantive content, the injunction must still be lifted. *As the most recent and more particular enactment of federal law, IGRA controls.* . . . Thus, insofar as the ACA previously provided an implicit cause of action to Oklahoma to attack the Horseshoe Bend Bingo enterprise, through the passage of IGRA's comprehensive enforcement scheme there exists the "mutual exclusivity necessary to impute to Congress the clear, affirmative intent to repeal" that part of the incorporated ACA.

Id. at 1180 n. 19 (emphasis added), quoting *United States v. Cook*, 922 F.2d 1026, 1034 (2d Cir. 1991).

The Tenth Circuit's opinion demonstrates that IGRA is the comprehensive scheme for regulating Indian gaming, taking precedent over any prior federal law ceding such power to a state. "By designating the United States' jurisdiction as 'exclusive' over Indian gaming, Congress intended that no functionally equivalent power would remain in the states under such 'pre-existing' federal law." *Id.*

The Fifth Circuit's decision is fundamentally at odds with Congress' intent in enacting a national policy governing Indian gaming. The bizarre result is that if IGRA

does not apply to the Tribe, as the Fifth Circuit concluded, the Tribe's gaming may not be subject to any federal or state regulation. This is contrary to the stated purpose of IGRA, which provides:

> [T]o declare that the establishment of independent Federal authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. § 2702(3).

Under the Fifth Circuit's opinion, the National Indian Gaming Commission diappears, because it simply has no jurisdiction. The Restoration Act, the Act which the Fifth Circuit held to be the exclusive law of gaming by the Tribe, has no federal regulatory oversight for gaming.

The lack of regulatory oversight in the Restoration Act also reinforces the Tribe's position that IGRA is the more specific act, and therefore controls. Under the Restoration Act, even Texas lacks any regulatory jurisdiction over gaming on the Tribe's lands.

The holding adversely impacts every Indian tribe. Every statute that recognizes an Indian tribe, settles a land claim or affects a tribe and every operative treaty dealing with a tribe must be canvassed to determine whether IGRA governs gaming by such tribe.[6]

Notwithstanding the Fifth Circuit's announcement that the Tribe has already made its "compact" with the State of Texas, the fact is that Congress rejected both a complete assimilation of Texas gaming laws and a complete ban on gaming, and instead created an overall regulatory

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[6] By way of example, does the grant of jurisdiction in the Maine Indian Claims Settlement Act, 25 U.S.C. § 1725, prevent the application of IGRA?

scheme where the Restoration Act and IGRA are in harmony. To hold otherwise destroys the national Indian gaming policy, continues the conflict among circuits and discriminates among federally recognized Indian tribes. In addition, it denies this tribe the opportunities intended by Congress.

CONCLUSION

The Tribe respectfully requests that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 93-8477, 93-8823 and 94-50130

YSLETA DEL SUR PUEBLO,
Plaintiff-Appellee,

v.

STATE OF TEXAS
and ANN RICHARDS, Governor,
Defendants-Appellants.

YSLETA DEL SUR PUEBLO,
Plaintiff-Appellee,

v.

STATE OF TEXAS
and ANN RICHARDS, Governor,
Defendants-Appellants.

YSLETA DEL SUR PUEBLO,
Plaintiff-Appellee,

v.

STATE OF TEXAS
and ANN RICHARDS, Governor,
Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Texas

Oct. 24, 1994

Before REYNALDO G. GARZA, DEMOSS, and PARKER, Circuit Judges.

DEMOSS, Circuit Judge:

Pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-21, the Ysleta del Sur Pueblo ("Tribe"), a federally recognized Indian tribe located near El Paso, Texas, sued the state of Texas ("State") and its governor for refusing to negotiate a compact that would permit the Tribe to engage in casino-type gambling on its reservation. Having concluded that neither IGRA nor the Restoration Act, 25 U.S.C. § 1300g, barred the Tribe from engaging in such gambling, the district court granted the Tribe summary judgment. We hold that the Restoration Act, not IGRA, governs this dispute and does not give the Tribe the right to sue the State in federal court. We therefore reverse the district court's summary judgment for the Tribe and remand with instructions to dismiss the Tribe's suit.

I.

Before analyzing the State's appeals, we first provide some background on the Restoration Act, IGRA, and the procedural history of this case.

A.

In 1968, the federal government recognized the Tiwa Indians [1] of the Ysleta del Sur Pueblo as an Indian tribe but simultaneously transferred responsibility for the Indians to the state of Texas. *See* Tiwa Indians Act, Pub.L. No. 90-287, 82 Stat. 93 (1968). Although the Tiwa Indians Act constituted legal recognition of the Indians, it had no practical effect on the relationship between the federal government and the Tribe because "[t]he Tribe

[1] Prior to passage of the Restoration Act, the Ysleta del Sur Pueblo were known as the Tiwa Indians. Section 102 of the Restoration Act officially changed the name of the Tribe. 25 U.S.C. § 1300g-1.

had not been subject to federal supervision and had received no federal Indian services before the 1968 Act, and that status continue [sic] after its enactment." S. REP. No. 90, 100th Cong., 1st Sess. 7 (1987). Instead, Texas administered the Tribe's affairs, which included holding the Tribe's 100-acre reservation in trust and providing economic development funds to the Tribe. H.R. REP. No. 36, 100th Cong., 1st Sess. 2 (1987). Furthermore, the Tiwa Indians Act expressly recognized that the Tiwa Indians were "subject to all obligations and duties [as] citizens under the laws of the [s]tate of Texas." *See* Tiwa Indians Act.

In 1983, however, Texas became concerned that its trust relationship with the Tribe violated state constitutional law. H.R. REP. No. 36, at 2. Consequently, the United States and the Tribe began the process of granting the Tribe federal trust status. In December 1985, the House of Representatives of the 99th Congress passed H.R. 1344, a bill to restore the trust relationship between the United States and the Tribe. With regard to gaming activities, § 107 of H.R. 1344 provided:

> Gaming, lottery or bingo on the tribe's reservation and on tribal lands shall only be conducted pursuant to a tribal ordinance or law approved by the Secretary of the Interior. Until amended as provided below, the tribal gaming laws, regulations and licensing requirements shall be identical to the laws and regulations of the State of Texas regarding gambling, lottery and bingo.

131 CONG.REC. H12012 (daily ed. Dec. 16, 1985) (text of H.R. 1344 as passed by the House). Notwithstanding § 107, various state officials and members of Texas' congressional delegation still were concerned that H.R. 1344 did not provide adequate protection against high stakes gaming operations on the Tribe's reservation. Believing that restoration of their federal trust status was more important than exercising the option to operate gaming op-

erations, the Tribe approved Resolution No. TC-02-86 in March 1986.[2] The resolution represented a political

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[2] Because of its critical importance to our resolution of this case, we re-print, with emphasis in certain portions, Resolution No. TC-02-86:

> WHEREAS, on December 16, 1985, the United States House of Representatives passed H.R. 1344, a bill to provide for the restoration of the federal trust relationship to the Ysleta del Sur Pueblo (Tigua Indian Tribe of Texas), and H.R. 1344 is now before the United States Senate for consideration; and,
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> WHEREAS, after hearings on H.R. 1344 before the House Committee on Interior and Insular Affairs on October 17, 1985, the Comptroller of Public Accounts for the State of Texas raised concerns that H.R. 1344 would permit the Tribe to conduct high stakes gambling and bingo operations to the detriment of existing charitable bingo operations in the State of Texas; and,
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> WHEREAS, the Comptroller urged members of the Texas Congressional Delegation to defeat H.R. 1344 unless the bill was amended to provide for direct application of state laws governing gaming and bingo on the reservation; and,
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> WHEREAS, *the Ysleta del Sur Pueblo has no interest in conducting high stakes bingo or other gambling operations on its reservation, regardless of whether such activities would be governed by tribal law, state law or federal law*; and,
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> WHEREAS, in response to the concerns voiced by the Comptroller and other officials, the Tribe attempted to insure that H.R. 1344 would give the Tribe no competitive advantage in gaming operations by agreeing to amend H.R. 1344 to provide that any gaming activities on the reservation would be conducted pursuant to tribal law that would be required to be identical to state law, and H.R. 1344 was so amended by the House Interior committee; and,
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> WHEREAS, some state officials and members of the Texas congressional delegation continue to express concern that H.R. 1344, as amended, does not provide adequate protection against high stakes gambling operations on the reservation; and,
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> WHEREAS, the proposal that H.R. 1344 be amended to make state gaming law applicable on the reservation continues to be wholly unsatisfactory to the Tribe in that it represents a substantial infringement upon the Tribes' power of self govern-

accommodation between the Tribe, the state of Texas, and various members of Texas' congressional delegation. The Tribe clearly viewed the applicability of state gaming laws on its reservation as an infringement on its sovereignty. But to ensure passage of the restoration legislation, the Tribe urged Congress to adopt "language which would provide that all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the State of Texas, shall be prohibited on the Tribe's reservation or on tribal land." The distinction between the language in § 107, as passed by the House, and the Tribe's suggested language is that § 107 provided the Tribe with the option to deviate from Texas' gaming laws *if* the Tribe petitioned the secretary of Interior, the secretary approved, and Congress did not overrule the

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ment, is inconsistent with the central purposes of restoration of the federal trust relationship, and would set a potentially dangerous precedent for other tribes who desire to operate gaming facilities and are presently resisting attempts by State to apply their law to reservation gaming activities; and,

WHEREAS, *the Ysleta del Sur Pueblo remains firm in its commitment to prohibit outright any gambling or bingo in any form on its reservation*; and,

WHEREAS, although the Tribe, as a matter of principle, sees no justification for singling out the Texas Tribes for treatment different than that accorded other Tribes in this country, *the Tribe strongly believes that the controversy over gaming must not be permitted to jeopardize this important legislation, the purpose of which is to ensure the Tribe's survival, protect the Tribe's ancestral homelands and provide the Tribe with additional tools to become economically and socially self-sufficient;*

NOW, THEREFORE, BE IT RESOLVED, that the Ysleta del Sur Pueblo respectfully requests its representatives in the United States [Senate] and House of Representatives to amend [§ 107(a) of the Restoration Act] by striking all of that section as passed by the House of Representatives and ***substituting in its place language which would provide that all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the State of Texas, shall be prohibited on the Tribe's reservation or on tribal land.***

secretary. The Tribe's suggested language, on the other hand, established that Texas law with regard to gaming would effectively operate as surrogate federal law. The resolution also clearly indicates that the Tribe, at the time of the resolution's adoption, "ha[d] no interest in conducting high stakes bingo or other gambling operations on its reservation" and "remain[ed] firm in its commitment to prohibit outright any gambling or bingo in any form on its reservation."

The Senate of the 99th Congress incorporated the Tribe's suggested language. Section 107 of H.R. 1344, as passed by the Senate in September 1986, provided that "[g]aming, gambling, lottery or bingo as defined by the laws and administrative regulations of the State of Texas is hereby prohibited on the tribe's reservation and on tribal lands." 132 CONG.REC. S13634 (daily ed. Sept. 25, 1986) (text of H.R. 1344 as passed by the Senate). Shortly thereafter, however, the Senate vitiated action on H.R. 1344, *see* 132 CONG.REC. S13735 (daily ed. Sept. 25, 1986), whereupon the bill died.

The resoration legislation was reintroduced as H.R. 318 in the 100th Congress, and the House passed the bill in April 1987. Section 107 of H.R. 318 provided that, "[p]ursuant to Tribal Resolution T.C.-02-86 which was approved and certified on March 12, 1986, all gaming as defined by the laws of the State of Texas shall be prohibited on the tribal reservation and on tribal land." 133 CONG.REC. H2051 (daily ed. April 21, 1987) (text of H.R. 318 as passed by the House). The Senate approved H.R. 318 in July 1987. The Senate amended § 107 to read:

> All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of

> Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-02-86 which was approved and certified on March 12, 1986.

133 CONG.REC. S10568 (daily ed. July 23, 1987) (text of H.R. 318 as passed by the Senate). According to the Senate Report accompanying the legislation, the only difference between § 107 as passed by the Senate and § 107 as passed by the House was that the Senate version "expand[s] on the House version to provide that anyone who violates the federal law on gaming contained in [§ 107] will be subject to the same civil and criminal penalties that are provided under Texas law." S.REP. No. 90, 100th Cong., 1st Sess. 8-9 (1987). Otherwise, the report stated, the "central purpose" of the two versions was the same: "to ban gaming on the reservations as a matter of federal law." *Id.* at 8. The House concurred in the Senate's amendments in August 1987, *see* 133 CONG.REC. H6972 (daily ed. Aug. 3, 1987), whereupon H.R. 318 became public law 100-89. Section 107 of the Restoration Act is now codified at 25 U.S.C. § 1300g-6.[3]

B.

In the midst of the 100th Congress' deliberations over the Restoration Act, the Supreme Court issued its opinion in *California v. Cabazon Band of Mission Indians,* 480

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[3] The Restoration Act restored not only the Ysleta del Sur Pueblo's federal trust status but also the federal trust status of the Alabama and Coushatta Indian tribes. The Act has two titles. Title I, 25 U.S.C. § 1300g, concerns the Ysleta del Sur Pueblo, and Title II, 25 U.S.C. §§ 731-37, concerns the Alabama and Coushatta Indian tribes. The two titles are nearly identical, particularly with regard to the sections concerning gaming. It is important to note that the Alabama and Coushatta Indian tribes are *not* parties to this suit. In fact, these tribes recently voted to *not* engage in casino-style gambling on their reservation. *See* Dianna Hunt, *Indians Defeat Plan for Casino on Reservation,* HOUSTON CHRON., June 16, 1994, at 1A.

U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987). In that case, two Indian tribes located in California were sponsoring unregulated gaming activities on their reservations.[4] The state of California attempted to enforce against the tribes a state statute regulating bingo operations. The tribes sued, asserting that California had no authority to enforce its gaming laws and regulations on tribal reservations because the United States, which has plenary power over Indian affairs, had not authorized California to do so. California argued that, pursuant to Public Law 280 of 1953,[5] the United States had expressly authorized California to enforce its bingo statute against the tribes. Public Law 280 specifically granted California authority to (1) enforce its criminal laws on Indian reservations,[6] hear in its civil courts civil causes of action in which an Indian is a party.[7] California argued in *Cabazon Band* that its bingo statute was a criminal law which could be enforced on Indian reservations.[8]

The Supreme Court disagreed. The Court began by noting that, while Public Law 280 broadened California's authority with regard to Indian reservations, Congress did not intend to grant it general civil regulatory authority. Public Law 280, the Court reasoned, was narrowly tailored to combat lawlessness on reservations and *not* "to effect total assimilation of Indian tribes into mainstream American society." *Cabazon Band,* 480 U.S. at 207-08, 107 S.Ct. at 1087. Thus, according to the Court, when a state

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[4] The California tribes were sponsoring bingo, draw poker, and other card games.

[5] *See* Pub.L. No. 83-280, ch. 505, §§ 2 & 4, 67 Stat. 588 (1953) (codified at 18 U.S.C. § 1162(a) and 28 U.S.C. § 1360(a) respectively).

[6] *Id.* § 2 (codified at 18 U.S.C. § 1162(a)).

[7] *Id.* § 4 (codified at 28 U.S.C. § 1360(a)).

[8] In addition to California, Public law 280 applied to five other states: Alaska, Minnesota, Nebraska, Oregon, and Wisconsin.

invokes Public Law 280 to enforce its laws, it must be determined whether the law is "criminal" in nature, and therefore applicable, or "civil" in nature, and therefore inapplicable *except* when the law is relevant to private civil litigation in state court. The question of whether a law is criminal or civil, in turn, depends on the law's practical effect. That is, a state law is criminal, and thus applicable under Public Law 280, if it generally *prohibits* certain conduct, but a state law is civil, and presumptively inapplicable, if it *regulates* the conduct at issue. *Cabazon Band,* 480 U.S. at 209-10, 107 S.Ct. at 1088.

Applying the criminal-prohibitory/civil-regulatory dichotomy,[9] the Court rejected California's claim that its bingo statute was criminal in nature on the basis that the statute is not a general prohibition on certain conduct. Instead, "the state law generally permits the conduct at issue, subject to regulation."[10] *Id.* at 209, 107 S.Ct. at 1088. The Court analogized California's bingo statute to the state's other gambling statutes, all of which regulate (rather than prohibit) the relevant conduct.[11]. The Court concluded that, given the extent to which the state currently regulated gambling, California had no public policy against bingo in particular or gambling in general. *Id.* at 211, 107 S.Ct. at 1089. California therefore could not prohibit the tribes from offering the gaming activities on their reservations.

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[9] The Court noted that this Circuit originally enunciated the dichotomy in *Seminole Tribe of Florida v. Butterworth,* 658 F.2d 310 (5th Cir.1981), *Cabazon Band,* 480 U.S. at 209-10, 107 S.Ct. at 1088.

[10] The statute in particular required bingo games to be operated by unpaid members of designated charitable organizations. In addition, it limited prizes to $250 and required profits to be used for charitable purposes. CAL.PENAL CODE § 326.5 (1987).

[11] In addition to bingo, California permits, with certain regulatory constraints, a lottery, pari-mutuel betting on horse races, and card games. *Cabazon Band,* 480 U.S. at 210-11, 107 S.Ct. at 1088-89.

Cabazon Band led to an explosion in unregulated gaming on Indian reservations located in states that, like California, did not prohibit gaming. While Congress recognized that the growth in gaming generated substantial revenues for the tribes and, hence, fostered tribal autonomy, it nontheless became concerned that unregulated growth might invite criminal elements. In 1988, Congress therefore enacted the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-21. IGRA was intended to balance the right of tribes to self-government with the need "to protect both the tribes and the gaming public from unscrupulous persons." *See generally,* S. REP. No. 446, 100th Cong., 2d Sess. 1-3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3071-73.

IGRA establishes three distinct classes of gaming—Class I, Class II, and Class III—each with its own degree of regulation. IGRA defines Class I gaming as social games typically offered at traditional Indian ceremonies. 25 U.S.C. § 2703(6). IGRA expressly states that it does not regulate Class I gaming. *Id.* § 2710(a)(1). IGRA defines Class II gaming as bingo and non-banking card games (i.e., card games in which the casino has no economic interest in the outcome). *Id.* § 2703(7)(A). IGRA provides that a tribe may engage in Class II gaming so long as the state in which the tribe is located "permits" such gaming. *Id.* § 2710(b)(1). Finally, IGRA defines Class III gaming as all other forms of gaming, *id.* § 2703(8), particularly the lucrative casino-style games such as blackjack, slot machines, roulette and baccarat. *See* S. REP, No. 446 at 3, 7 U.S.Code Cong. & Admin.News 1988, pp. 3073, 3077. IGRA places two important conditions on Class III gaming. First, just as it does with Class II gaming, IGRA establishes that a tribe may engage in Class III gaming so long as the state in which the tribe is located "permits" such gaming. 25 U.S.C. § 2710(d)(1)(B). Second, IGRA requires a tribe that seeks to engage in Class III gaming to negotiate a compact with the

state in which it is located. *Id.* § 2710(d)(1)(C). Congress viewed tribal-state compacts as the most effective means of balancing tribal sovereignty with the states' need to protect the public against the risks typically associated with Class III-type gaming. S. REP. No. 446 at 13-14, U.S.Code Cong. & Admin.News 1988, pp. 3083-3084. If a state refuses to negotiate a compact with a tribe, IGRA permits the tribe to sue the state in federal court. 25 U.S.C. § 2710(d)(7)(A)(i).

C.

Pursuant to IGRA, the Ysleta del Sur Pueblo petitioned the governor of Texas in February 1992 to begin negotiations to enter into a tribal-State compact.[12] Governor Ann Richards took the position that she could not negotiate a compact for the proposed gaming activities because Texas law and public policy forbid such gaming activities. The tribe therefore sued the State in April 1993. In May 1993, The State moved to dismiss on the grounds that the Eleventh and Tenth Amendments barred the suit. The district court denied the State's motion in June 1993, and the State appealed in July 1993. The State's appeal from the district court's denial of the motion to dismiss (No. 93-8477) represents the first of three appeals in this case.

After we denied a motion to stay the proceedings pending resolution of the State's first appeal,[13] the parties returned to district court. In September 1993, the Tribe and the State each filed motions for summary judgment. The parties' motions primarily focused on a host of detailed IGRA-related questions, such as whether Texas law

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[12] The Tribe specifically proposed baccarat, blackjack, craps, roulette and slot machines, which hereinafter will be referred to collectively as "proposed gaming activities."

[13] The motion to stay was filed along with the first appeal. We denied the motion in August 1993, with the caveat that the governor could not be subject to process in the district court during the pendency of the State's first appeal.

currently "permits" Class III games to be played. The parties also raised the issue of whether the Restoration Act *independently* bars the Tribe from engaging in Class III-type gaming. In November 1993, the district court granted the Tribe summary judgment. *Ysleta del Sur Pueblo v. State of Texas,* 852 F.Supp. 587 (W.D.Tex. 1993). The court found that Texas effectively "permits" the Class III games in which the Tribe is seeking to engage, and that therefore Texas could not refuse to negotiate a tribal-state compact. *Id.* at 590-96. The court also found that the Restoration Act *does not* serve as an independent bar to the Tribe's gaming plans. *Id.* at 597.

In response to the court's summary judgment for the Tribe, the State filed its second appeal (No. 93-8823) in November 1993. The State again moved for a stay in the proceedings pending resolution of this latest appeal. Instead of granting a stay, we consolidated the State's two appeals in January 1994 and expedited their consideration. Meanwhile, the Tribe, in response to the State's second appeal, filed with this court a motion to dismiss that appeal for lack of jurisdiction. The Tribe argued that, absent the appointment of a mediator,[14] the district court's summary judgment for the Tribe was not a final judgment for purposes of 28 U.S.C. § 1291. The Tribe's motion, however, was subsequently rendered moot when the district court appointed a mediator in February 1994. To ensure that its second appeal was properly preserved, the State formally appealed the court's appointment of a mediator. We consolidated the State's third appeal (No. 94-50130) with its remaining two (Nos. 93-8477 & 93-8823).

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[14] IGRA provides that, if a tribe and a state fail to reach a compact within the sixty-day period following a court order to do so, the court is empowered to appoint a mediator to choose between each party's "last best offer for a compact." 25 U.S.C. § 2710(d)(7)(B)(iv).

II.

Our sister circuits have split on the issue of whether IGRA constitutionally permits an Indian tribe to sue a state. *Compare Seminole Tribe of Florida v. State of Florida,* 11 F.3d 1016, 1026-28 (11th Cir.1994) *with Cheyenne River Sioux Tribe v. State of South Dakota,* 3 F.3d 273, 280-81 (8th Cir.1993).[15] The State has appealed precisely the same issue. However, as is apparent below, our resolution of the State's *second* appeal renders this issue moot. Mindful that we should not reach constitutional issues when a case can be resolved on other grounds, we will merely assume, without deciding, that Congress did not exceed its constitutional authority when it enacted IGRA.

III.

We now consider the State's two remaining appeals (Nos. 93-8823 & 94-50130), both of which essentially appeal the district court's order granting summary judgment in favor of the Tribe and denying the State's cross-motion for summary judgment. In their respective motions for summary judgment, the parties devoted most of their discussion to IGRA-related questions. The parties addressed the issue of whether Texas law "permits" the Tribe's proposed gaming activities to be played "for any purpose by any person." 25 U.S.C. § 2710(d)(1)(B). Texas, of course, argued that its laws and public policy prohibit the Tribe's proposed gaming activities, whereas the Tribe argued the exact opposite. The State alternatively argued that the Restoration Act independently bars the Tribe from engaging in its proposed gaming activities. The Tribue argued that under either IGRA or the Restora-

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[15] *See also* William T. Bisset, *Tribal-State Gaming Compacts: The Constitutionality of the Indian Gaming Regulatory Act,* 21 HASTINGS CONST. L.Q. 71, 76-92 (1993); Joseph J. Weissman, Note, *Upping the Ante: Allowing Indian Tribes to Sue States in Federal Court Under the Indian Gaming Regulatory Act,* 62 GEO.WASH.L. REV. 123, 133-61 (1993).

tion Act, the analysis and the conclusion are the same: Texas law does not prohibit the proposed gaming activities, and therefore Texas cannot bar the Tribe from engaging in them. As to both IGRA and the Restoration Act, the district court agreed with the Tribe and granted its motion for summary judgment. *See Ysleta,* 852 F.Supp. at 590-97. We conclude that (1) the Restoration Act and IGRA establish different regulatory regimes with regard to gaming, (2) the Restoration Act prevails over IGRA when gaming activities proposed by the Ysleta del Sur Pueblo are at issue, and (3) the Tribe's suit is barred because the Restoration Act did not even attempt to abrogate the State's Eleventh Amendment immunity.

A.

The Tribe insists that, under either IGRA or the Restoration Act, the analysis for determining whether the Tribe's proposed gaming activities are allowed is the same. Specifically, it insists that § 107(a) of the Restoration Act does not operate as an independent bar to its proposed gaming activities because Texas does not "prohibit" the proposed gaming activities. The first sentence of § 107 (a) of the Restoration Act provides: "All gaming activities which are prohibited by the laws of the State of Texas are prohibited on the reservation and on lands of the tribe." 25 U.S.C. § 1300g-6. The Tribe maintains that the term "prohibit" has special significance in federal Indian law, which is derived from *Cabazon Band,* and whether a federal court is interpreting IGRA or the Restoration Act, it should apply the same analysis, i.e., the *Cabazon Band* criminal-prohibitory/civil-regulatory dichotomy. Thus, according to the Tribe, the critical question under either IGRA or the Restoration Act is whether Texas law and public policy "prohibit" (that is, criminalize rather than regulate) the proposed gaming acivities.[16]

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[16] The Tribe contends that both IGRA and the Restoration Act incorporated the *Cabazon Band* rationale because both statutes were passed by the same committees in each chamber at roughly the same time.

The Tribe argues that Texas does not prohibit the Tribe's proposed gaming activities by pointing to the State's broad definition of a lottery: " 'Lottery means the procedures operated by the state under this chapter through which prizes are awarded or distributed by chance among persons who have paid, or unconditionally agreed to pay, for a chance or other opportunity to receive a prize." TEX.GOV'T.CODE ANN. § 466.002(3) (Vernon Supp.1994). The Tribe contends that its proposed gaming activities fall within the State's definition of lottery. That is, like a lottery, the Tribe's proposed gaming activities (i.e., baccarat, blackjack, craps, roulette and slot machines) are all games of prize, chance and consideration. Because the State permits one type of game where the elements are prize, chance and consideration, the State no longer prohibits any other games with the same elements. The State, instead, merely regulates them. Consequently, according to the Tribe, § 107 (a) of the Restoration Act does not act as an independent bar to the Tribe's proposed gaming activities.

The Tribe's argument is appealing only because § 107 (a) of the Restoration Act uses the word "prohibit." But our analysis of the legislative history of both the Restoration Act and IGRA leads us to a conclusion contrary to that sought by the Tribe. When it passed IGRA, Congress indicated that, when determining whether Class II games are "prohibited" in certain states, federal courts should rely on *Cabazon Band*'s criminal-prohibitory/civil-regulatory distinction.[17] No such express recogniton of

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[17] In the committee report accompanying IGRA, Congress stated that:

> Federal courts will rely on the distinction between State criminal laws which prohibit certain activities and the civil laws of a State which impose a regulatory scheme upon those activities to determine whether class II games are allowed in certain States. This distinction has been discussed by the Federal courts many times, most recently by the Supreme Court in *Cabazon*.

S. REP. No. 446 at 6. Thus, while Congress was specific as to *Cabazon Band*'s application to Class II gaming, Congress left open

Cabazon Band appears in the committee reports accompanying the Restoration Act. Rather, in considering the Restoration Act, Congress clearly was concerned with enacting the compromise between the Tribe, the State and various members of the Texas congressional delegation. Congress specifically drafted § 107(a) "in accordance with the tribe's request in tribal Resolution No. T.C.-02-86." 25 U.S.C. 1300g-6(a). That resolution is crystal clear. The Tribe, in response to the concerns of Texas officials and various members of the State's congressional delegation, petitioned Congress to adopt "language which would provide that all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the State of Texas, shall be prohibited on the Tribe's reservation or on tribal land." Congress acquiesced, and in so doing, spelled out the purpose of § 107(a): [t]his section provides that gambling, lottery or bingo *as defined by the laws and administrative regulations* of the State of Texas is prohibited on the tribe's reservation and on tribal lands." S. REP. No. 90 at 10 (emphasis added). The report's reference to both the laws *and* administrative regulations of Texas is clearly inconsistent with a contention that the Tribe and Congress contemplated that the prohibitory-regulatory distinction of *Cabazan Band* would be involved in analyzing the Restoration Act. Furthermore, as a means of enforcing those laws and regulations, Congress provided in § 107(a) that "[a]ny violation of the prohibition provided in this subsection shall be subject to *the same civil and criminal penalties* that are provided by the laws of the State of Texas." 25 U.S.C. § 1300g-6(a) (emphasis added). Again, if Congress intended for *Cabazon Band* analysis to control, why would it provide that one who violates a certain gaming prohibition is subject to a *civil* penalty? We thus conclude that Congress

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the question as to whether that case applied to Class III gaming. Because we conclude that the Restoration Act clearly does not incorporate *Cabazon Band*, we leave open the question of whether IGRA incorporates *Cabazon Band* with regard to Class III gaming.

did not enact the Restoration Act with an eye towards *Cabazon Band*.[18] Congress was merely acceding to the Tribe's request that the tribal resolution be codified. *See* S. REP. No. 90 at 8 (the Tribe, "by formal resolution, requested that this legislation incorporate [its] existing law and custom that forbids gambling").[19]

The Tribe points to two items in the Restoration Act's legislative history that it believes indicates Congress incorporated *Cabazon Band* into § 107(a) of the Act. First, Congress noted in its report that § 107(b) "is a restatement of the law as provided in [Public Law 280]." *Id.* at 10. The reference to Public Law 280, the statute at issue in *Cabazon Band*, presumably is the hook on which the Tribe hangs this argument. The Tribe's argument, however, misses the mark, because § 107(b), as opposed to § 107(a), states only that the Restoration Act is not to be construed as a grant of civil or criminal regulatory jurisdiction to the State. In that sense *only*, § 107(b) is a restatement of Public Law 280. But it is § 107(a) that determines whether Texas "prohibits" certain gaming activities, and § 107(a) is *not* a restatement of Public Law 280.

The Tribe's second argument admittedly raises a closer question. In August 1987, as the Restoration Act was on the brink of final passage in the House of Representatives, a member made the following statement on the floor of the House:

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[18] Our conclusion is buttressed by the fact that the Restoration Act, which (like IGRA) was enacted after *Cabazon Band* was decided, makes no reference to the case, whereas IGRA does. *See* S. REP. No. 446 at 6, U.S.Code Cong. & Admin.News 1988, p. 3076. We take IGRA's reference to *Cabazon Band* as evidence that Congress knew how to incorporate the case when it so intended.

[19] The report also states that the "central purpose" of § 107(a) is "to ban gaming on the reservations as a matter of federal law." S. REP. No. 90 at 8.

> It is my understanding that the Senate amendments to [§ 107] are in line with the rational [sic] of the recent Supreme Court decision in the case of Cabazon Band of Mission Indians versus California. This amendment in effect would codify for [the Tribe] the holding and rational [sic] adopted in the Court's opinion in the case.

133 CONG.REC. H6975 (daily ed. Aug. 3, 1987) (statement of Rep. Udall). Standing alone, this statement supports the Tribe's argument that Congress intended to incorporate *Cabazon Band* into the Restoration Act. But we find ourselves confronted with substantial legislative history to the contrary, including the plain language of § 107(a), its accompanying report language, and the tribal resolution to which § 107(a) expressly refers. We cannot set aside this wealth of legislative history simply to give meaning to the floor statement of just one representative that was recited at the twelfth hour of the bill's consideration. *See, e.g., Fort Stewart Schools v. Federal Labor Relations Auth.*, 495 U.S. 641, 648-50, 110 S.Ct. 2043, 2047-48, 109 L.Ed.2d 659 (1990). Rather, upon reviewing these materials, we are left with the unmistakable conclusion that Congress—and the Tribe—intended for Texas' gaming laws and regulations to operate as surrogate federal law on the Tribe's reservation in Texas.[20]

B.

We find it significant that § 107(c) of the Restoration Act establishes a procedure for enforcement of § 107(a)

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[20] We are aware that the Supreme Court has established some rules of construction as to Acts of Congress relating to Indian affairs which require that Congress' intention be "explicit," "clear," "unambiguous," "plain" and "specific." *See United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 62 S.Ct. 248, 86 L.Ed. 260 (1941); *United States v. Dion*, 476 U.S. 734, 106 S.Ct. 2216, 90 L.Ed.2d 767 (1986); *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 1984). The Restoration Act satisfies these requirements.

which is fundamentally at odds with the concepts of IGRA. Under § 107(c), the state of Texas is authorized to file suit in a federal court to enjoin any violation by the Tribe of the provisions of § 107(a). 25 U.S.C. § 1300g-6(c); *see also* S. REP. No. 90 at 9. The state of Texas did not initiate this litigation under § 107(c); rather, the Tribe brough this suit under IGRA. Because the Restoration Act and IGRA establish such fundamentally different regimes, we now must decide which statute applies in this case. The Tribe argues that, to the extent that a conflict between the two exists, IGRA impliedly repeals the Restoration Act. We disagree. The Supreme Court has indicated that "[r]epeals by implication are not favored." *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442, 107 S.Ct. 2494, 2497, 96 L.Ed.2d 385 (1987). The Court in *Crawford Fitting* further noted that, "where there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Id.* at 445, 107 S.Ct. at 2499 (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153, 96 S.Ct. 1989, 1992, 48 L.Ed.2d 540 (1976)). With regard to gaming, the Restoration Act clearly is a specific statute, whereas IGRA is a general one. The former applies to two specifically named Indian tribes located in one particular state, and the latter applies to all tribes nationwide. Congress, when enacting IGRA less than one year after the Restoration Act, explicitly stated in two separate provisions of IGRA that IGRA should be considered in light of other federal law.[21] Congress never indicated in IGRA that it was expressly repealing the Restoration Act. Congress also did

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[21] *See* 25 U.S.C. § 2701(5) ("[t]he Congress finds that . . . Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by federal law"); *id.* § 2710(b)(1)(A) (tribes may engage in Class II gaming if, *inter alia*, "such gaming is not otherwise specifically prohibited on Indian lands by Federal law").

not include in IGRA a blanket repealer clause as to other laws in conflict with IGRA. Finally, we note that in 1993, Congress expressly stated that IGRA is *not* applicable to one Indian tribe in South Carolina, evidencing in our view a clear intention on Congress' part that IGRA is not to be the one and only statute addressing the subject on gaming on Indian lands.[22] Therefore, we conclude not only that the Restoration Act survives today but also that it—and not IGRA—would govern the determination of whether gaming activities proposed by the Ysleta del Sur Pueblo are allowed under Texas law, which functions as surrogate federal law.

The Tribe warns that our conclusion (i.e., that Texas gambling laws and regulations are surrogate federal law) will constitute a substantial threat to its sovereignty in that "[e]very time the State modifies its gambling laws, the impact will be felt on the reservation." However, any threat to tribal sovereignty is of the Tribe's own making. The Tribe noted in its resolution that it viewed § 107(a) of the Restoration Act as "a substantial infringement upon the Tribes' [sic] power of self government" but nonetheless concluded that relinquishment of that power was necessary to secure passage of the Act. To borrow IGRA terminology, the Tribe has already made its "compact" with the state of Texas, and the Restoration Act embodies that compact. If the Ysleta del Sur Pueblo wishes to vitiate the compact it made to secure passage of the Restoration Act, it will have to petition Congress to amend or repeal the Restoration Act rather than merely comply with the procedures of IGRA.

C.

Finally, having concluded that the Restoration Act governs this case, we now must determine whether the Tribe's suit against the State is cognizable. The Eleventh Amend-

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[22] *See* 25 U.S.C. § 941*l*(a).

ment bars any suit against a state in federal court, unless either the state has waived its sovereign immunity or Congress, pursuant to another provision in the Constitution, has expressly abrogated the state's immunity. *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 237-40, 105 S.Ct. 3142, 3144-46, 87 L.Ed.2d 171 (1985). A state's sovereign immunity under the Eleventh Amendment includes immunity from suits brought by Indian tribes. *Blatchford v. Native Village of Noatak,* 501 U.S. 775, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991). While the State clearly raised the Eleventh Amendment as a defense to the Tribe's IGRA suit, it did not do the same with regard to the Restoration Act. The State's omission, however, does not mean we are precluded from raising the issue *sua sponte,* because the Eleventh Amendment operates as a jurisdictional bar. *See Edelman v. Jordan,* 415 U.S. 651, 678, 94 S.Ct. 1347, 1363, 39 L.Ed.2d 662 (1974); *Ortiz v. Regan,* 749 F.Supp. 1254, 1264 (S.D.N.Y.1990); 13 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3524 at 167-71. We find nothing in the record indicating that the state of Texas consented to the Tribe's suit. Likewise, in enacting the Restoration Act, Congress said nothing whatsoever which could be construed as an abrogation of the State's sovereign immunity. Accordingly, we reverse the district court's summary judgment in favor of the Tribe and remand the case with instructions to dismiss the Tribe's suit for lack of jurisdiction.

IV.

For the foregoing reasons, we REVERSE the district court's summary judgment for the Tribe and REMAND with instructions to DISMISS the Tribe's suit.

UNITED STATES DISTRICT COURT
W.D. TEXAS
PECOS DIVISION

No. P-93-CA-29

YSLETA DEL SUR PUEBLO

v.

STATE OF TEXAS
and ANN RICHARDS,
GOVERNOR OF THE STATE OF TEXAS

Nov. 1, 1993

MEMORANDUM OPINION AND ORDER

BUNTON, Senior District Judge.

BEFORE THIS COURT, in the above-captioned cause of action, are the following:

1. Defendants' Motion for Partial Summary Judgment with Brief in Support Thereof;

2. Plaintiff's Motion for Summary Judgment with Brief in Support Thereof;

3. Plaintiff's Response to Defendants' Motion for Partial Summary Judgment with Brief in Support Thereof;

4. Defendants' Response to Plaintiff's Motion for Summary Judgment with Brief in Support Thereof;

5. Plaintiff's Supplemental Motion for Summary Judgment with Brief in Support Thereof;

6. Defendants' Supplemental Motion for Summary Judgment with Brief in Support Thereof;

7. Plaintiff's Response to Defendants' Supplemental Motion for Summary Judgment with Brief in Support Thereof; and

8. Defendants' Reply to Plaintiff's Supplemental Motion for Summary Judgment.

BACKGROUND

Plaintiff, Ysleta Del Sur Pueblo (hereinafter referred to as the "Tribe"), is a federally recognized Indian Tribe whose reservation is located in El Paso County, Texas. The Defendants are the State of Texas and Ann Richards, Governor of the State of Texas. On February 12, 1992, the Tribe requested that the Governor of Texas, Ann Richards, enter into negotiations for the formation of a compact with the Tribe which would allow the Tribe to conduct various types of gaming activities on their Tribal lands, pursuant to the Indian Gaming Regulatory Act (hereinafter referred to as "IGRA"), 25 U.S.C. § 2701, et seq. On March 5, 1992, Karen Abernathy, Director of Scheduling in the office of the Governor acknowledged the Tribe's request but due to the Governor's heavy schedule, declined to meet with the Tribe to discuss the possible formation of a compact.

However, over the period of the next thirteen months, several meetings did take place betwene Tribal representatives and representatives from the Governor's General Counsel. During the course of these meetings, the Tribe proposed several versions of a Tribal State Compact. The Governor's representatives refused to negotiate over any proposed compact which would include any casino-style games.

As a result of a newspaper article published in the final edition of *The Houston Post* on April 1, 1993, in which the Governor was quoted as saying that the State would not negotiate a compact which included casino-style games, the Tribe filed this action.

In the Tribe's Complaint, filed on April 15, 1993 the Tribe requested this Court to issue an Order requiring the State to enter into negotiations for the formation of a Tribal-State compact within a sixty day period from the entry of any such Order, pursuant to the IGRA. In the Tribe's First Amended Complaint, filed September 28, 1993, the Tribe seeks a determination as to exactly which games are the proper subject of negotiations of a Tribal-State compact under the IGRA.

STANDARD ON MOTION FOR SUMMARY JUDGMENT

Summary judgment, "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see Hansen v. Continental Ins. Co.*, 940 F.2d 971, 975 (5th Cir.1991); *Hogue v. Royse City*, 939 F.2d 1249, 1252 (5th Cir.1991). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.P. 1).

"All facts contained in the pleadings, depositions, admissions, and answers to interrogatories are reviewed by 'drawing all inferences most favorable to the party opposing the motion.'" *James v. Sadler*, 909 F.2d 834, 836

(5th Cir. 1990) (quoting *Reid v. State Farm Mut. Auto Ins. Co.*, 784 F.2d 577, 578 (5th Cir.1986)); *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 474 (5th Cir.1989); *Moore v. Mississippi Valley State Univ.*, 871 F.2d 545, 549 (5th Cir.1989); *Degan v. Ford Motor Co.*, 869 F.2d 889, 892 (5th Cir.1989). However,

> "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial."

Duplantis v. Shell Offshore, Inc., 948 F.2d 187, 190-91 (5th Cir. 1991) (quoting Fed.R.Civ.P. 56(e)).

Accordingly, the focus of this Court is upon disputes over material facts; that is, facts likely to affect the outcome of the lawsuit under the governing substantive law which will preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *Phillips Oil Co. v. OKC Corp.*, 812 F.2d 265, 272 (5th Cir.), *cert. denied*, 484 U.S. 851, 108 S.Ct. 152, 98 L.Ed.2d 107 (1987). The Fifth Circuit stated "[t]he standard of review is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the non-moving party based upon the record evidence before the court." *James*, 909 F.2d at 837; *see Matsushita Elec. Industr. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 588 (1986); *Boeing Co. v. Shipman*, 411 F.2d 365, 374-375 (5th Cir.1969) (en banc).

The Supreme Court's 1986 triology of summary judgment cases clarified the test for summary judgment. In the first case of the triology, *Anderson*, the Court stated the trial court must consider the substantive burden of

proof imposed on the party making the claim. A plaintiff has the burden with respect to each of his or her claims and a defendant has the burden with respect to his or her defenses and claims for affirmative relief. *Anderson* requires this Court to substantively evaluate the evidence offered by the moving and nonmoving parties. "[T]he requirement is that there be no *genuine* issue of *material* fact." *Id.* at 248, 106 S.Ct. at 2510 (emphasis in original). A dispute is "genuine" "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.*

In the second case of the triology, *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), the Supreme Court reiterated the requirement that once the party moving for summary judgment has made a prima facie showing there is no genuine issue as to any material fact, the nonmoving party must then come forward with "specific facts" showing a genuine issue for trial. "Its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* at 586, 106 S.Ct. at 1356. The burden shifts to the nonmoving party to produce evidence in support of its claims. "The nonmovant can satisfy its burden by tendering depositions, affidavits, and other competent evidence to buttress its claim." *Topalian v. Ehrman,* 954 F.2d 1125, 1132 (5th Cir.1992). The nonmovant cannot establish a fact issue by resting on the mere allegations of the pleadings. "In fact, unsupported allegations or affidavits setting forth 'ultimate or conclusory facts and conclusions of law' are insufficient to either support or defeat a motion for summary judgment." *Galindo v. Precision Am. Corp.,* 754 F.2d 1212, 1216 (5th Cir.1985).

The third case of the trilogy, *Celotext Corp v. Catrett,* 477 U.S. 317, 106 S.Ct. 2458, 91 L.Ed.2d 265 (1986),

held when the moving party shows the opposing party is unable to produce the evidence in support of its case, summary judgment is appropriate. The entry of summary judgment is mandated " 'after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and upon which that party will bear the burden of proof at trial.' " *Kidd v. Southwest Airlines, Co.*, 891 F.2d 540, 547 (5th Cir. 1990) (quoting *Celotex Corp.*, 477 U.S. at 318, 106 S.Ct. at 2552). In *Celotex Corp.*, it was not necessary for the motion for summary judgment to be supported by affidavits or other materials specifically negating the nonmoving party's claim so long as the District Court was satisfied of the absence of evidence to support it.

Nothing in Rule 56(c) "requires that an oral hearing be held on a motion for summary judgment." *McMillian v. City of Rockmart*, 653 F.2d 907, 911 (5th Cir.1981); *see Fed.R.Civ.P.* 78; Local Court Rule CV-7(h). However, this Court has demonstrated its willingness to allow a nonmoving party a day in court in borderline cases where, under the governing law or reasonable extensions of existing law, the hearing of some testimony would be helpful to understanding the proper application of the law. However, such is not the situation in the case at bar.

DISCUSSION

The issues presented by the Tribe and the State in their Motions for Summary Judgment are: (1) Whether or not, under the IGRA, the Governor and the State of Texas have failed to negotiate in good faith with the Tribe over the formation of a Tribal-State Compact; (2) which games that the Tribe has requested are the proper subject of negotiations under Class III gaming of the IGRA; (3) whether the Johnson Act, 15 U.S.C. § 1171, *et seq.*, prevent the transportation of the proposed gambling devices in the State of Texas; and (4) whether or not the

Restoration Act, 25 U.S.C. § 1300g-6, prohibits gaming activities pursuant to the IGRA.

THE IGRA FRAMEWORK

Congress enacted the IGRA in 1988. In § 2701 Congress listed its findings:

> (1) numerous tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal government revenue;
>
> * * * *
>
> (3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;
>
> (4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and
>
> (5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a state which does not, as a matter of criminal law and public policy, prohibit such activity.

25 U.S.C. § 2701.

The stated purposes of the IGRA are:

> (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting economic development, self-sufficiency, and strong tribal governments;
>
> (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming

> is conducted fairly and honestly by both the operators and the players; and
>
> (3) to declare that the establishment of independent Federal authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. § 2702.

Under IGRA gaming is divided into three classes. Class I gaming includes "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individual as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703 (6). Class I gaming is subject to the exclusive jurisdiction of the Indian tribes. 25 U.S.C. § 2710(a)(1).

Class II gaming means "the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) . . . . including (if played at the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo and card games that—(I) are explicitly authorized by the laws of the State, or (II) are not explicitly prohibited by the laws of the State and are played at any location in the State," provided such card games comply with the laws and regulations of the State regarding hours of operation, limitations on wagers, and pot sizes. 25 U.S.C. § 2703(7)(A). Class II gaming does not include "any banking card games, including baccarat, chemin de fer, or blackjack, or . . . . electronic or electromechanical facsimilies of any game of chance or slot machines of any kind." 25 U.S.C. § 2703(7)(B). The tribes have jurisdiction over Class II gaming, subject to the requirements of IGRA and the oversight of the

National Indian Gaming Commission. 25 U.S.C. § 2710 (b).

Class III gaming includes all forms of gaming that are not Class I or II gaming. 25 U.S.C. § 2703(8). The games that are in dispute are Class III games. In regard to Class III games the IGRA provides:

> Class III gaming activities shall be lawful on Indian lands only if such activities are—
>
> (A) authorized [by an approved Tribal] ordinance or resolution. . . .,
>
> (B) *located in a State that permits such gaming for any purpose by any person, organization, or entity,* and
>
> (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

25 U.S.C. § 2710(d) emphasis added).

If a tribe wishes to engage in Class III gaming activities on tribal land, it must "request the state in which such lands are located to enter into such negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities." 25 U.S.C. §2710(d)(3)(a). Upon receiving the request, the state *must* negotiate in good faith with the tribe. *Id.* (emphasis added).

The stimulus that led to the passage of the IGRA was the Supreme Court's decision in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987). Before discussing *Cabazon* it is necessary to determine if Congress intended the *Cabazon* analysis to be applied in cases brought under the IGRA. 25 U.S.C. § 2710(d). The State of Texas asserts that the analysis in *Cabazon* should not be followed because Texas is not a P.L. 280 state. Pub.L. No. 83-280, codified as 18 U.S.C. § 1162 and 28 U.S.C. § 1360, gave certain

states limited civil and general criminal jurisdiction in certain areas of Indian country within their borders. The State asserts that it is unnecessary for this Court to apply the civil/regulatory or criminal/prohibitory analysis because it is superseded by the language in the IGRA.

The definitive language in the IGRA in order to determine whether or not a particular game is the proper subject of a Tribal-State Compact is the phrase "located within a State that permits such gaming for any purpose by any person, organization or entity".

The Senate Report accompanying IGRA's passage provided the following guidance in construing the above mentioned language in IGRA:

> [T]he Committee anticipates that Federal courts will rely on the distinction between State criminal laws which prohibit certain activities and the civil laws of a State which impose a regulatory scheme upon those activities to determine whether class II games are allowed in certain States. This distinction has been discussed by the Federal Courts many times, most recently by the Supreme Court in *Cabazon.*

S.Rep. No. 446, 100th Cong., 2d Sess., reprinted in 1988 U.S.C.C.A.N. 3071, 3076. Although the language in the Report refers to Class II gaming, it also applies to Class III gaming. *See Mashantucket Pequot Tribe v. State of Conn.*, 913 F.2d 1024, 1030 (2d Cir. 1990), *cert. denied.* 499 U.S. 975, 111 S.Ct. 1620, 113 L.Ed.2d 717 (1991) (applying well settled principles of statutory construction the Court found the Senate Report's conclusion regarding the application of *Cabazon* analysis applicable to Class III gaming). *See also U.S. v. Sisseton-Wahpeton Sioux Tribe,* 897 F.2d 358, 366 (8th Cir.1990); *Rumsey Indian Rancheria of Wintun Indians, Table Mountain Rancheria v. Wilson,* No. Civ-S-92-812, 1993 WL 360652 (E.D.Cal. July 20, 1993), and *Seminole Tribe of Florida v. Florida,* No. 91-6756-CIV, 1993 WL 475999 (S.D.Fla. September

22, 1993). The civil/regulatory and criminal/prohibitory analysis was intended to be part of the IGRA framework determining the appropriate scope of Class III gaming.

In *Cabazon,* interpreting a California statute, which allowed some forms of bingo but not high stakes bingo, the Supreme Court found the statute to be regulatory in nature, stating:

> California does not prohibit all forms of gambling. California itself operates a state lottery, and daily encourages its citizens to participate in this state-run gambling. California also permits pari-mutuel horse-race betting. Although certain enumerated gambling games are prohibited . . . , games not enumerated . . . are permissible. . . . [B]ingo is legally sponsored by many different organizations and is widely played in California . . . In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular.

480 U.S. at 211, 107 S.Ct. at 1089. The Court cautioned that the mere fact that a law could be enforced by criminal as well as civil mechanisms did not automatically convert it into a criminal law. The key is "whether the conduct at issue violates the State's public policy." 480 U.S. at 209, 107 S.Ct. at 1089.

The State maintains that Texas has a broad policy against commercial gambling. Specifically they point out that Texas prohibits all forms of gambling with the exception of bingo, pari-mutuel betting on horse and dog races, charitable raffles, and the Texas lottery. Tex.Penal Code § 47.01 *et seq.* The Tribe maintains that the public policy with respect to gaming in Texas is civil/regulatory.

Not only does Texas allow the above-mentioned gambling activities, but it also allows electronic, electrome-

chanical, or mechanical games of chance as long as the reward is a non-cash prize with a value of no more than five dollars. Act of June 17, 1993, ch. 774, §, 1993 Tex.Sess.Law Serv. 3030 (Vernon). Additionally, wagers on carnival contests are not considered illegal so long as the prize is limited to merchandise worth no more than $25.00. Tex.Penal Code Ann. § 47.01(1)(C), (D) (Vernon Supp. 1992). Finally, social gambling is not illegal if the place in which the gambling is conducted is private, there are even chances and risks, and there is no bank. Tex.Penal Code Ann. § 47.02(b).

It can no longer be asserted that Texas' public policy is against gambling. *Carnical Leisure Industries, Ltd. v. Aubin,* 830 F.Supp. 371 (S.D.Tex.1993). By allowing pari-mutuel gambling at horse and dog tracks, various bingo games, and promoting a multi-billion dollar lottery, Texas can no longer assert that it has a broad public policy against gambling, to so claim would be anachronistic. *Id. See also U.S. v. Sisseton-Wahpeton Sioux Tribe,* 897 F.2d 358, 367 (8th Cir.1990) (South Dakota law was civil/regulatory where state permitted bingo, horse and dog racing, a state lottery and slot machines); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin,* 770 F.Supp. 480 (W.D.Wis.1991), *app. dism'd,* 957 F.2d 515 (7th Cir.1992), *cert. denied,* —— U.S. ——, 113 S.Ct. 91, 121 L.Ed.2d 53 (1992) (State law is civil/regulatory where it permits pari-mutuel betting on horse, dog and snow mobile racing, allows charitable raffiles and bingo, and operates lottery and lotto). Thus this Court agrees with the Tribe, Texas is a civil/regulatory jurisdiction when it comes to gaming.

The IGRA and *Cabazon* combined demonstrate that a two-step analysis must be employed to determine which Class III games are the proper subject of a Tribal-State Compact. *Rumsey Indian Rancheria of Wintun Indians, Table Mountain Rancheria v. Wilson,* No. Civ-S-92-812, 1993 WL 360652 (E.D.Cal. July 20, 1993). In step one the court must determine whether the state permits

the gaming activity to be played "for any purpose by any person" *Id.* If the game is permitted then it is clear that the game is the proper subject of a Tribal State Compact under the IGRA, thus the analysis ends at that point. However, if the game is not permitted by the state then the court must proceed to step two of the analysis. It is under step two that the *Cabazon* analysis is utilized to ascertain whether the proposed game violates the state's public policy. If the state's public policy does not prohibit the game, then the game is the proper subject of a Tribal-State Compact. The Court in *Rumsey* summarized the analysis as follows:

> The effect of IGRA is simply to provide a shortened application of the *Cabazon* rule where a game is found to be played within a state. In such instance, no further analysis is necessary to find the game is proper for a Tribal-State compact. In every other case, however, *Cabazon* retains its full vitality and a game will only be prohibited on Indian lands if it violates the state's public policy.

Id.

It is also important to note that the Tribe does not have to show that the state formally authorizes the same gaming activities of which they plan to offer; the key inquiry is whether the state prohibits those activities. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin,* 770 F.Supp. at 487.

TRIBE'S PROPOSED GAMES

Black Jack, Roulette, Baccarat, Craps (Dice), and "Slot" machines, including electronic and electromechanical games of chance, are the games that the Tribe has sought to include in the negotiations of the Tribal-State Compact. The Tribe asserts that the games it has proposed should be included in the negotiation of a Tribal-State compact under the IGRA. The State asserts that the "casino-type" games the Tribe proposes are not permitted in Texas and are not the proper subject of any

negotiations. Specifically, the State has maintained that the only Class III gaming activities allowed are those which Texas expressly allows, parimutuel betting on horse and dog racing and the State Lottery. The State maintains the specific gaming activities requested by the Tribe are neither "played" nor allowed; therefore, such gaming activities should not be included in the negotiation of a Tribal-State Compact under the IGRA.

The Tribe maintains that each of the games it has requested are permitted in Texas. The Tribe uses the definition of "Lottery" as that term is defined in the State lottery Act in support of its position.

When the present State constitution was adopted, it contained the following provision:

> The legislature shall pass laws prohibiting the establishment of lotteries and gift enterprises in this State, as well as the sale of tickets in lotteries, gift enterprises or other evasions involving the lottery principle, established or existing in other States.

Tex. const. art. III, § 47 (1876). At that time there was no constitutional or legislative definition of "lottery". It was not until 1936 when the Texas Supreme Court decided *City of Wink v. Griffith Amusement Co.*, 129 Tex. 40, 100 S.W.2d 695 (1936) (citation omitted), in which the elements of a lottery were stated as the offering of a prize, the award of a prize by chance, and the giving of a consideration for an opportunity to win the prize.

The first legislative definition of the term "lottery" appeared in 1974 when Texas adopted its present Penal Code:

> "Lottery" means any scheme or procedure whereby one or more prizes are distributed by chance among persons who have paid or promised consideration for a chance to win anything of value, whether such scheme or procedure is called a pool, lottery, raffle,

> gift, gift enterprise, sale, policy game, or some other name.

Tex.Penal Code Ann. § 47.01(6) (Vernon 1989). On November 5, 1991, the State of Texas amended its constitution to provide that the Legislature by general law may authorize that State to operate lotteries. Tex. Const. Art. III, § 47(e) (1991). When the Legislature passed the State Lottery Act, lottery is defined as:

> "Lottery" means the procedures operated by the State under this Act through which prizes are awarded or distributed by chance among persons who have paid, or unconditionally agreed to pay, for a chance or other opportunity to receive a prize.

Tex.Rev.Civ.Stat.Ann. art. 179g, § 1.02(3) (Vernon Supp.1992). As evidenced by the above definition, lottery is broadly defined and includes as its elements prize, chance, and consideration.

The State argues that although the legislature could authorize casino gambling, that has no bearing on any issue before this Court. The State further argues that whether or not the gaming activities requested by the Tribe could fall under the definition of "lottery" in the Lottery Act is irrelevant. *Id.* The State appears to have missed the point. Again we return to the key phrase in IGRA: "permits such gaming for any purpose by any person, organization, or entity . . .".

In determining whether Texas permits the gaming activities at issue it is not necessary to determine whether or not the State has given express approval to the playing of a particular game. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wisconsin,* 770 F.Supp. at 486. In *Lac du Flambeau* the State of Wisconsin could engage in any game of chance, prize, and consideration under its lottery laws. The tribe sought to include casino games, video games and slot machines in its negotiations with Wisconsin. Wisconsin argued that since the games the tribe requested were not specifically

authorized under state law, they were not required to negotiate over those types of games. The court concluded that since Wisconsin was a civil/regulatory jurisdiction, and under the lottery law the state was permitted to play any game of prize, chance and consideration, then it must negotiate a Tribal-State compact governing the conduct of any type of class III gaming requested by the tribe which involved prize, chance and consideration. This Court agrees with the reasoning of *Lac du Flambeau.*

The State cites *Seminole Tribe of Florida v. Florida,* No. 91-6756-CIV, 1993 WL 475999 (S.D.Fla. September 22, 1993), for the proposition that just because the state allows some types of Class III gaming to occur the state is not required to engage in negotiations over all types of Class III gaming activities. The Court agrees with the State in that regard; however, the court in *Seminole* was interpreting Florida's Constitution and Statutes, not Texas'. Furthermore the Tribe does not advance that position before this Court, they maintain that the games they seek to include in the negotiations are permissible under the existing laws of Texas.

Interpreting the Texas Lottery Act, the only restriction found with regard to the Act's broad definition of lottery is contained in § 2.02(k):

> The Comptroller shall adopt rules prohibiting the operation of any game using a video lottery machine or machine. As used in this subsection "video lottery machine" or "machine" means any electronic video game machine that, upon the insertion of cash, is available to play or simulate the play of a video game, including but not limited to video poker, keno, and blackjack, utilizing a video display in microprocessors in which the player may receive free games or credits that can be redeemed for cash, coins or tokens, or that directly dispense cash, coins, or tokens.

Tex.Rev.Civ.Stat.Ann. art. 179g, § 2.02(k) (Vernon Supp.1992). The State Lottery Act only excludes the

video forms of casino games, not the live or other non-video electronic games.

The Texas Lottery Act is not the only legislation that supports the Tribe's position that Texas allows "casino gaming". In section 47.01 of the Texas Penal Code a bet is defined as:

> "Bet" means an agreement that, dependent on chance even though accompanied by some skill, one stands to win or lose something of value. A bet does not include:
>
> (A) ....
>
> (B) ....
>
> (C) an offer of merchandise with a value not greater than $25, made by the proprietor of a bona fide carnival contest conducted at a carnival sponsored by a non-profit religious, fraternal, school, law enforcement, youth, agricultural, or civic group, if the person to receive the merchandise from the proprietor is the person who performs the carnival contest.

Texas Penal Code Ann. § 47.01 (Vernon 1989). The above exception is referred to as the "carnival exception". A recent opinion of Attorney General Dan Morales dated April 20, 1992, dealing with the validity of casino nights sponsored by charitable organizations held that they would be in violation of the law unless they came within the carnival exception. The opinion states:

> Those participating in "casino games" at the described non profit charitable organizations fund raising event would violate the Penal Code § 47.02 prohibition on gambling—"making bets"—unless as a matter of fact, the "casino games" in question would fall within the "carnival contests" exception to the definition of "bet" in the Penal Code § 47.01(1)(C) and (D).

Op.Tex.Att'y Gen. No. DM-112 (1992).

Thus, it is clear that casino gaming is permitted under the carnival exception; therefore satisfying the requirement of section 2710(d)(1) of IGRA. . . ."permits such gaming *for any purpose by any person, organization, or entity*. . . .". (emphasis added).

On June 17, 1993, section 47.01 of the Texas Penal Code was amended to exclude from the definition of gambling device:

> . . . any electromechanical or mechanical contrivance designed, made, and adopted solely for bona fide amusement purposes if the contrivance rewards the player exclusively with noncash merchandise prizes, toys, or novelties or representation of value redeemable for those items which have a wholesale value available from a single play of the game or device of not more than 10 times the amount charged to play the game or device once or $5.00, whichever is less.

Act of June 17, 1993, ch. 774, § 1, 1993 Tex.Sess. Laws 3030 (Vernon).

Because casino gaming is permitted by some persons and individuals under the carnival exception, and based on the definition of "lottery" in the Texas Lottery Act allowing games which include chance, prize, and consideration, the Court is of the opinion that the casino games requested by the Tribe should be included in the negotiations of Tribal-State Compact under the IGRA.

GOOD-FAITH NEGOTIATIONS UNDER IGRA

The Tribe, in addition to asserting that the State has "wholly" failed to negotiate, asserts that the State has failed to negotiate in good faith. The State has consistently refused to negotiate with the Tribe concerning the "casino tsyle" games the tribe has proposed. The State has maintained that the proposed games are not allowed in Texas; therefore it has repeatedly refused to engage in negotiations over the Tribe's proposed games.

When the State wholly fails to negotiate it cannot meet its burden of proof to show that it has negotiated in good faith. *Mashantucket Pequot Tribe v. State of Connecticut,* 913 F.2d 1024 (2nd Cir.1990). Furthermore:

> The State's protestations that its failure to negotiate resulted from sincerely held views as to the meaning of the IGRA, and that it declared its willingness to resolve these legal issues of first impression by litigation, do not alter the outcome. The statutory terms are clear, and provide no exception for sincere but erroneous legal analyses. Further, the manifest purpose of the statute is to move negotiations toward a resolution where a state either fails to negotiate, or fails to negotiate in good faith, for 180 days after a tribal request to negotiate. The delay is hardly ameliorated because that state's refusal to negotiate is not malicious.

Id. See also Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, 770 F.Supp. at 482 (where the state wholly fails to negotiate, it cannot meet its burden to establish that it has bargained in good faith).

It is not necessary to repeat the State's position, suffice it to say that it is clear that the State has failed to negotiate with the Tribe. Before the Court concludes that the State must negotiate with the Tribe, the State's arguments under the Johnson Act and the Restoration Act must be addressed.

JOHNSON ACT

The State contends that the transportation of any gambling devices would be illegal under the Johnson Act, 15 U.S.C. § 1172. Gambling devices are defined as, among other things, any slot machine or other:

> machine or mechanical device (including, but not limited to, roulette wheels and similar devices) de-

> signed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may be entitled to receive, as the result of the application of an element of chance, any money or property . . .

Id. at § 1171(a)(2). The IGRA expressly provides that the prohibitions contained in the Johnson Act "shall not apply to any gaming conducted under a Tribal-State Compact that . . . (A) is entered into. . . . by a State in which gambling devices are legal, and (B) is in effect." 25 U.S.C. § 2710(d)(6). To support their position the Defendant's cite *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Greene,* 995 F.2d 179 (10th Cir. 1993).

In *Potawatomi,* the Tenth Circuit Court of Appeals held that since video lottery terminals were not allowed under the provisions of Oklahoma law, the Johnson Act prohibited their transportation and the waiver contained in the IGRA did not apply since the subject gambling devices were not legal in the state of Oklahoma. The holding of *Potawatomi* is narrow, gambing devices that are not legal in the subject state cannot be transported or used within Indian country within that state absent a statutory exception to the prohibition. Oklahoma has no state run lottery and does not allow the numerous gambling activities that Texas permits.

Additionally, the language of § 1172 under the IGRA expressly permits transportation of gambling devices, if those devices are designed for use at and transported to licensed gambling establishments where betting is legal under applicable laws . . ." 15 U.S.C. § 1172. It is the opinion of the Court that the type of gambling devices at issue are exempt from the Johnson Act pursuant to section 2701(d)(6) of the IGRA.

RESTORATION ACT

The State of Texas argues that 25 U.S.C., § 1300g-6 of the Restoration Act, which restored federal trust status to the Ysleta Del Sur Pueblo in 1987, precludes gaming by the tribe pursuant to the IGRA.

As part of the Restoration Act, § 1300g-6, prohibited the tribe from engaging in any gaming activity that was prohibited by the laws of the State of Texas. Section 1300g-6 provides:

> (a) In general
>
> All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on land of the tribe. Any violation of the prohibition provided in this subsection will be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-02-86 which was approved and certified on March 12, 1986.
>
> (b) No State regulatory jurisdiction
>
> Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

The clear purpose and intent of the IGRA is to further the economic development of Indian Tribes and to further the longstanding federal goal of establishing tribal independence and self-sufficiency. The State is basically arguing that the IGRA and its clear purpose, allowing gaming activities to be conducted by tribes on tribal lands, should be ignored and that the Ysleta Del Sur Pueblo be barred from obtaining the benefits IGRA was intended to provide for Indian Tribes, this the Court is unwilling to do. The law is clear and well settled, it is basic statutory construction that where there is a conflict in two statutory

enactments, the latter enactment will control *U.S. v. Crittenden,* 600 F.2d 478 (5th Cir.1979).

Even if this Court were to follow the State's argument, the Restoration Act would have no effect on the relief the Tribe requests. The Tribe has requested Class III gaming activities which are not prohibited by the laws of the State of Texas.

CONCLUSION

The Court finds that the State is required to negotiate with the Tribe concerning the casino-type games of chance that the tribe has proposed. Furthermore, neither the Johnson Act nor the Restoration Act prohibits the games that the Tribe has proposed.

IT IS ORDERED that the State of Texas is required to conclude a Tribal-State Class III Gaming Compact with Plaintiff Ysleta Del Sur Pueblo Indians within sixty (60) days from the date of this Order.

[Filed Nov. 21, 1994]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 93-8477
93-8823

YSELTA DEL SUR PUEBLO,
Plaintiffs-Appellee,

versus

STATE OF TEXAS
and ANN RICHARDS, Governor,
Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING

(November 21, 1994)

Before REYNALDO G. GARZA, DeMOSS, and PARKER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above cases is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
United States Circuit Judge

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8, cl. 3:

> The Congress shall have Power . . . to regulate Commerce . . . with the Indian Tribes[.]

U.S. Const. amend. XI:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATUTES INVOLVED

18 U.S.C. § 1166

§ 1166. Gambling in Indian country

(a) Subject to subsection (c), for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.

(b) Whoever in Indian country is guilty of any act or omission involving gambling, whether or not conducted or sanctioned by an Indian tribe, which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred, under the laws governing the licensing, regulation, or prohibition of gambling in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(c) For the purpose of this section, the term "gambling" does not include—

(1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or

(2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act that is in effect.

(d) The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act, or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

* * * *

25 U.S.C. § 1300g-2(a)-(c)

§ 1300g-2. Restoration of the Federal trust relationship; Federal services and assistance

(a) Federal trust relationship

The Federal trust relationship between the United States and the tribe is hereby restored. Sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title, and all laws and rules of law of the United States of general application to Indians, to nations, tribes, or bands of Indians, or to Indian reservations which are not inconsistent with any specific provision ocntained in this subchapter shall apply to the members of the tribe, the tribe, and the reservation.

(b) Restoration of rights and privileges

All rights and privileges of the tribe and members of the tribe under any Federal treaty, statute, Executive order, agreement, or under any other authority of the United States which may have been diminished or lost under the Tiwa Indians Act are hereby restored.

(c) Federal services and benefits

Notwithstanding any other provision of law, the tribe and the members of the tribe shall be eligible, on and after August 18, 1987, for all benefits and services furnished to federally recognized Indian tribes.

* * * *

25 U.S.C. § 1300g-4(a), (f)

§ 1300g-4. Provisions relating to tribal reservation

(a) Federal reservation established

The reservation is hereby declared to be a Federal Indian reservation for the use and benefit of the tribe without regard to whether legal title to such lands is held in trust by the Secretary.

* * * *

(f) Civil and criminal jurisdiction within reservation

The State shall exercise civil and criminal jurisdiction within the boundaries of the reservation as if such State had assumed such jurisdiction with the consent of the tribe under sections 1321 and 1322 of this title.

* * * *

25 U.S.C. § 1300g-6

§ 1300g-6. Gaming activities

(a) In general

All gaming activities which are provided by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-02-86 which was approved and certified on March 12, 1986.

(b) No State regulatory jurisdiction

Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

(c) Jurisdiction over enforcement against members

Notwithstanding section 1300g-4(f) of this title, the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) of this section that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.

* * * *

25 U.S.C. § 2701

§ 2701. Congressional findings

The Congress finds that—

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue,

(2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

* * * *

25 U.S.C. § 2702

§ 2702. Congressional declaration of policy

The purpose of this chapter is—

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

* * * *

25 U.S.C. § 2703(5), (6), (7)(a)(b), & (8)

§ 2703. Definitions

For purposes of this chapter—

* * * *

(5) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians which—

(A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and

(B) is recognized as possessing powers of self-government.

(6) The term "class I gaming" means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

(7)(A) The term "class II gaming" means—

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)—

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,

including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that—

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State,

but only is such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "class II gaming" does not include—

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

* * * *

(8) The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

* * * *

25 U.S.C. § 2710

§ 2710(d). Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be unlawful on Indian lands only if such activities are—

(A) authorized by an ordinance or resolution that—

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands;

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and sub-

mit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that—

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D) of this title.

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D)(i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation pro-

vided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any provision of this subsection—

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3)(A) Any Indian tribe having jurisdiction over the lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to—

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that

are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringen than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that—

(A) is entered into under paragraph (3) by a State in which gaming devices are legal, and

(B) is in effect.

(7)(A) The United States district courts shall have jurisdiction over—

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that—

(I) a Tribal-State compact has not been entered under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court—

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the

proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures—

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapproved a compact described in subparagraph (A) only if such compact violates—

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary,

but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of Section 2711 of this title.

* * * *

Public Law 90-287

AN ACT

Relating to the Tiwa Indians of Texas.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Indians now living in El Paso County, Texas, who are descendants of the Tiwa Indians of the Ysleta (Isleta) del Sur Pueblo settling in Texas at Ysleta in 1682, shall, from and after the ratification of this Act, be known and designated as Tiwa Indians of Ysleta, Texas, and shall continue to enjoy all rights, privileges, and immunities enjoyed by them as citizens of the State of Texas and of the United States before the enactment of this Act, and shall continue to be subject to all the obligations and duties of such citizens under the laws of the State of Texas and the United States.

SEC. 2. Responsibility, if any, for the Tiwa Indians of Ysleta del Sur is hereby transferred to the State of Texas. Nothing in this Act shall make such tribe or its members eligible for any services performed by the United States for Indians because of their status as Indians nor subject the United States to any responsibility, liability, claim, or demand of any nature to or by such tribe or its members arising out of their status as Indians, and none of the statutes of the United States which affect Indians because of their status as Indians shall be applicable to the Tiwa Indians of Ysleta del Sur. Nothing herein shall preclude the application to the people of the Tiwa Indians of programs undertaken pursuant to the Economic Opportunity Act of 1964 (78 Stat. 508), as heretofore or hereafter amended.

Approved April 12, 1968.

Supreme Court, U.S.
FILED
JAN 26 1995
OFFICE OF THE CLERK

NO. 94-1161

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

YSLETA DEL SUR PUEBLO,
Petitioner

v.

STATE OF TEXAS AND
THE GOVERNOR OF THE STATE OF TEXAS
Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

RESPONDENTS' BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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NO. 94-1161

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

YSLETA DEL SUR PUEBLO,
Petitioner

v.

STATE OF TEXAS AND
THE GOVERNOR OF THE STATE OF TEXAS
Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

RESPONDENTS' BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

At the Fifth Circuit Court of Appeals, the State Defendants argued that the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-21, violated the Eleventh Amendment to the extent that it allowed an Indian tribe to sue a state and that it violated the Tenth Amendment to the extent it coerced the state to negotiate a compact in the face of federal court action.[1]

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[1]These questions have previously been presented to this Court in Petitions for Writ of Certiorari: *Poarch Band of Creek Indians v. State of Alabama*, U.S. Supreme Court No. 94-34 (petition for certiorari); *State of Florida v. Seminole Tribe of Florida*, U.S. Supreme Court No. 94-219 (petition for certiorari); *State of Washington v. The Spokane Tribe of Indians*, U.S. Supreme Court No. 94-357 (petition for

Additionally, the State Defendants argued that if Congress had the power to waive the state's Eleventh Amendment immunity to allow Indian tribes to sue states as it attempted to do in IGRA, Texas was not required to negotiate casino gambling because casino gambling was not permitted for any purpose by any person, organization or entity in Texas, and it was against the public policy of Texas. Texas argued that any ambiguity that courts had found in the language of IGRA which would allow tribes to pursue any form of Class III gaming if the state allowed some form of Class III gaming, like a state lottery, could not operate in favor of the Ysleta del Sur Pueblo because the Tribe's Restoration Act, 25 U.S.C.A. §§ 1300g *et seq.* provided that "all gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on the lands of the tribe." 25 U.S.C. § 1300g-6(a) The State Defendants argued that, if IGRA waived the state's Eleventh Amendment immunity, the Restoration Act and IGRA should be harmonized by allowing IGRA to govern the procedures by which the Ysleta del Sur Pueblo could pursue gaming while allowing the Restoration Act to govern the substantive question regarding which gaming activities were allowed.[2]

SUMMARY OF THE ARGUMENT

The Fifth Circuit correctly held that the Restoration Act, 25 U.S.C. §§ 1300g *et seq.*, of the Tiwa Indians of the Ysleta del Sur Pueblo governs the determination of whether the casino gambling they propose to negotiate is allowed under

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certiorari); and *State of Oklahoma v. Ponca Tribe of Oklahoma*, U.S. Supreme Court No. 94-1029 (petition for certiorari).

[2]The Tribe's version of harmonizing does not give meaning to the provisions of each Act, but reduces the Restoration Act to the mirror image of IGRA.

Texas law. The Tribe has failed to show that the opinion of the Fifth Circuit conflicts with either the opinion of the First Circuit in *Rhode Island v. Narragansett Tribe of Indians*, 19 F.3d 685 (1st Cir.), cert. denied, ___ U.S. ___, 115 S.Ct. 294 (1994) or the Tenth Circuit in *United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170 (10th Cir. 1991). The Fifth Circuit has ruled on the impact of one tribe's accommodation to a state in the process by which it regained its federal trust relationship, and its ruling does not affect other tribes. Further, even if this Court determined that IGRA controlled, rather than the Restoration Act, a correct reconciliation of IGRA and the Restoration Act would reach the same result reached by the Fifth Circuit. Casino gambling is not properly the subject of a Tribal/State compact between the Ysleta de Sur Pueblo and the State of Texas.

ARGUMENT AND AUTHORITY

Though the State Defendants believe, as asserted in their cross-petition, that the Indian Gaming Regulatory Act (IGRA) should be reconciled with the Restoration Act, they do not accept the Tribe's position that the Restoration Act has no independent meaning in the face of IGRA. The Fifth Circuit correctly decided that the Ysleta del Sur Pueblo is not entitled to pursue casino gambling in Texas. The state believes that, even if this Court were to rule that IGRA is the federal law governing gaming for all Tribes, it would not change the result herein because both IGRA and the Restoration Act preclude this Tribe from conducting gaming activities criminally prohibited in Texas.

The Fifth Circuit correctly construed the Restoration Act as assimilating the gaming laws of Texas. The Tribe's attempt to mystify the similarity or difference between "prohibited" and "permitted" to focus on the public policy of Texas mis-states the real issue which is whether Class III gaming activities must be examined specifically activity by

activity under IGRA or whether any Class III gaming opens the door to all Class III gaming. The Tribe misrepresents Texas law when it states that "every form of gaming, except video lottery terminals and sports betting is permitted to the State of Texas." Petition at 9. The penal code prohibits every form of gambling except for certain narrow, highly regulated, exceptions. Pursuant to constitutional amendment, a state lottery and charitable bingo and raffles are allowed under the constitution, and under Texas statutes, pari-mutuel betting on horses and dogs is allowed. All other gambling, including possession of gambling devices, is criminally prohibited.[3] A state constitutional amendment would be required before casino gambling could be permitted in Texas. See Op. Tex. Atty's Gen. No. DM-302 (1994), Respondents' Appendix at 1a. The Tribe's arguments about regulatory jurisdiction are irrelevant to the issues presented by the Fifth Circuit's decision.

Contrary to the Tribe's assertion, Texas is not a Public Law 280 state and the Restoration Act is not a "Public Law 280" statute. Petition at 7. 28 U.S.C. §§ 1162, 1360 (1982 ed. and Supp. III). Texas has no criminal jurisdiction over gambling offenses committed on Tribal land. The Tribe introduces this argument because it believes that then the prohibitory/regulatory test set forth by this Court in *California v. Cabazon Band of Mission Indians*, 107 S.Ct. 1083, 480 U.S. 202 (1987) would be controlling and would result in a conclusion that, because Texas allows some Class III gaming, its posture is regulatory toward all Class III gaming. Though the Court's *Cabazon* decision affected IGRA and the prohibitory/regulatory distinction was incorporated in the Act's treatment of Class II gaming, it does not follow that it is the controlling principle in the area

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[3]It is a defense to prosecution that gambling with cards, dice or balls took place in a private place, no one received any benefit other than personal winnings, and that all participants had the same risks of winning or losing.

of Class III gaming. *See, e.g., Rumsey Indian Rancheria of Wintun Indians v. Wilson*, Nos. 93-16609 and 93-16745, 1994 WL 635178 at * 8 (9th Cir. November 15, 1994) (to be reported at 41 F.3d 421). The Ninth Circuit, in applying *Cabazon* to this complex area found that, in fact, *Cabazon* does not lead to the conclusion that, if a state permits and regulates some Class III gaming activities, it will be deemed to have merely a regulatory stance toward all forms of Class III gaming. *Rumsey*, 1994 WL 635178 at * 7. *Cabazon* does not establish that a state that permits some form of Class III gambling must negotiate all forms of Class III gambling proposed by a Tribe for inclusion in a Tribal/State compact.

The Tribe's attempt to show conflict between the Fifth Circuit's opinion in this case and the opinion of the First Circuit in *Rhode Island v. Narragansett Tribe of Indians*, 19 F.3d 685 (1st Cir. 1994) is flawed. The Settlement Act at issue in the Rhode Island case made the tribal lands subject to the civil and criminal laws and jurisdiction of the state. 25 U.S.C. § 1708. It is a general jurisdictional statute that does not deal specifically with gaming issues. The Restoration Act, at issue here, specifically prohibits all gaming activities on tribal land which are prohibited by the laws of the State of Texas. 25 U.S.C. § 1300g-6(a). It is a specific provision dealing with gaming. The Restoration Act further states that nothing in the section on gambling may be construed as a grant of state civil or criminal regulatory jurisdiction to the state. *Id.* The First Circuit implies that there could be a consensual transfer in the gaming area, albeit of criminal jurisdiction, which survives IGRA. This reasoning undermines the Tribe's position that no previous Act of Congress has independent meaning in the area of gaming after the passage of IGRA. *Rhode Island*, 19 F.3d at 697. Further, the threshold issue presented in *Rhode Island* was whether the Narragansett Tribe had jurisdiction over their land and exercised the governmental power which would allow them to qualify for the provisions of IGRA. In the case

at hand, the Tribe's jurisdiction is not at issue. Honoring the principal that "so long as ... two statutes, fairly construed, are capable of coexistence, courts should regard each as effective," the First Circuit read the Rhode Island Settlement Act and IGRA in a way that gives each force, finding that it is only with regard to Class I and Class II gaming that IGRA works a partial repeal of the Settlement Act. *Rhode Island*, 19 F.3d at 704. The court found that IGRA partially repealed the Settlement Act by applying the principle that a specific statute controls over a general, and the Settlement Act, being a general jurisdictional statute, must give way to IGRA on gaming issues because IGRA deals specifically with Indian gaming. The Tribe herein asserts that IGRA and the Restoration Act should be harmonized, but their version of harmony would have this Court honor IGRA and do great violence to the Restoration Act. The Restoration Act is not only specific to the Ysleta del Sur Pueblo, but it deals specifically with gaming. The Fifth Circuit correctly held that repeals by implication are not favored and that when there is conflict, the specific will not be controlled by the general. *Ysleta del Sur Pueblo v. State of Texas, et al.*, 36 F.3d 1325, 1335 (5th Cir. 1994). This does not conflict with the holding in *Rhode Island*.

Likewise, the Tribe's assertion of a conflict between the Fifth Circuit's decision in this case and the Tenth Circuit's decision in *United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170 (10th Cir. 1991) is flawed. *United Keetoowah* dealt with whether IGRA was intended to preempt state assertions of prosecutorial authority over Indian Bingo through the Assimilative Crimes Act (ACA), 18 U.S.C.A. § 13. Texas has not sought to enforce any state statute on gambling against the Tribe or on Tribal land. *United Keetoowah* held that IGRA did not intend to "repeal" the ACA. The Fifth Circuit's holding was that IGRA did not intend to repeal the Restoration Act.

And, finally, there is no similarity between the purposes of the ACA and the Restoration Act. The purpose of ACA is general--that is, "to cover crimes on which Congress has not legislated." *United Keetoowah*, 927 F.2d at 1180. Therefore, IGRA, as a matter of federal law dealing specifically with Indian gaming, modifies the ACA by excepting Class I and Class II gambling, and Class III gaming when conducted pursuant to Tribal-State compact, from the ACA's application of a state's gambling laws to Tribal lands. In contrast, the purpose of the Restoration Act is to establish Tribal lands, which is a prerequisite for application of IGRA. It deals specifically with gaming issues because the Tribe made a voluntary accommodation to the State of Texas during the restoration negotiations. 25 U.S.C.A. § 1300g-6(a). The Tenth Circuit's holding that IGRA preempts the ACA's application of state gambling laws to Tribal lands does not conflict with the Fifth Circuit's holding in the case at hand that the Tribe's agreement, as embodied in federal law, to abide by a state's gambling laws still had force after the passage of IGRA and that the Restoration Act, not IGRA, "would govern the determination of whether gaming activities proposed by the Ysleta de Sur Pueblo are allowed under Texas law, which functions as surrogate federal law." *Ysleta del Sur Pueblo*, 36 F.3rd at 1335. Nor does *United Keetoowah*, which deals exclusively with Class II gambling which is clearly defined by IGRA, address the underlying controversy, which is the definitional question of which of the unspecified possible gambling activities encompassed in Class III are appropriate subjects for negotiation under Texas law.

The Tribe has not shown a conflict between the decision of the Fifth Circuit herein and the decision of the First Circuit in *Rhode Island* or the decision of the Tenth Circuit in *United Keetoowah Band*. Furthermore, even if this Court determined as the Tribe requests, that IGRA is applicable to all Indian Tribes, under the facts of this case, if IGRA and the Restoration Act are reconciled, the result would still be that the Ysleta del Sur Pueblo would not be able to negotiate a

compact for casino gambling in Texas under the current state of Texas law.

CONCLUSION

Respondents respectfully request that this Court deny Petitioner's Writ of Certiorari to the United States Supreme Court.

Respectfully submitted,

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APPENDIX

APPENDIX

August 23, 1994

Honorable John T. Montford
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Honorable Senfronia Thompson
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Opinion No. DM-302

Re: Whether the legislatur may, by statute, and in th absence of a constitutiona amendment, authorize th operation of slot machine within the state of Texas; or in the alternative, whether i may authorize the state t operate slot machines and t contract with one or mor entities that will operate th slot machines on behalf o the state (RQ-642, ID 23991)

Dear Senator Montford and Representative Thompson:

Senator Montford requests our opinion as to whether the legislature may, by statute and in the absence of a constitutional amendment, authorize the operation of slot machines within the state of Texas. If the answer to this question is "no," Representative Thompson asks whether, under the 1991 amendment to the Texas Constitution, the legislature may authorize the *state* "to operate slot machines and to contract with one or more entities that will operate the slot machines on behalf of the State." We do not here determine whether any particular device which might be labeled a "slot machine" actually conforms to the statutory definition of "gambling device." Rather, for purposes of this opinion, we accept Senator Montford's description of a "slot machine" as

> a machine that runs electronically or mechanically and contains slots into which the player deposits money in the form of currency, coins, tokens, or a magnetic card, on the chance of receiving some amount of money greater than that deposited.

Furthermore, we add the qualification that the machine records the credits won on each play, and the credits are exchangeable for something of value. *See State v. Mendel*, 871 S.W.2d 906 (Tex. App.-Houston [14th Dist.] 1994, n.w.h.).

In order to answer Senator Montford's question, we must determine whether a slot machine is a "lottery" within the meaning of article III, section 47 of the Texas Constitution, which requires the legislature to "pass laws prohibiting lotteries and gift enterprises." If slot machines fall into the category of "lotteries," the legislature may not authorize their operation without a constitutional amendment.

When the present Texas Constitution was adopted in 1876, it contained the following provision regarding "lotteries":

> The Legislature shall pass laws prohibiting the establishment of lotteries and gift enterprises in this State, as well as the sale of tickets in lotteries, gift enterprises or other evasions involving the lottery principle, established or existing in other States.[1]

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[1]This general prohibition now appears as subsection (a) of article III, section 47. It reads:

Some of the briefs submitted to this office suggest that this provision, because it distinguished between "lotteries," "gift enterprises," and "other evasions involving the lottery principle," means that the term "lottery" should be construed, for constitutional purposes, very narrowly, and that in 1876, "lottery" could not have been intended to proscribe slot machines since that device was not invented until 1895. At most, these briefs argue, operation of a slot machine is an "evasion based on the lottery principle." When, in 1980, the "other evasions" language was deleted from article III, section 47, these briefs contend that the *constitutional* proscription against slot machines was lifted.[2]

As early as 1899, however, the Court of Criminal Appeals held that operation of a "slot machine," as described therein,[3] constituted a "lottery." *Prendergast v. State*, 57 S.W. 850, 851 (Tex. Crim. App. 1899). Then, in 1936, the Texas Supreme Court considered whether a "bank night" held

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(a) The Legislature shall pass laws prohibiting lotteries and gift enterprises in this State other than those authorized by Subsections (b), (d), and (e) of this section.

[2]The briefers acknowledge, of course, that operation of slot machines is still prohibited by *statute*, *viz.*, as a "gambling device" under chapter 47 of the Penal Code, but contend that the legislature may simply amend that statute to exclude slot machines from its ambit.

[3]The *Prendergast* court considered a very early version of the slot machine. It consisted of five colored slots-red, black, green, white, and yellow-into which the player could insert a nickel. If the player "won," the red and black slots paid out a dime; the green slot a quarter; the white slot fifty cents; and the yellow slot a dollar. Of course, in the usual circumstance, the player did not "win" anything. The court declared that, even though the machine itself "would be indictable as a gaming device," there is "no reason why the keeper [of the machine, *i.e.*, the owner of the premises in which the machine was displayed] was not also indictable for establishing a lottery." *Pendergast v. State*, 57 S.W. at 851.

weekly at a local theater[4] was a "lottery" under the constitution. *City of Wink v. Griffith Amusement Co.*, 100 S.W.2d 695 (Tex. 1936). In the course of its opinion, the court declared that article III, section 47, proscribed three activities: 1) lotteries, 2) gift enterprises, and 3) other evasions involving the lottery principle.[5] Furthermore, the court clearly articulated the three elements necessary to constitute a lottery: 1) the offering of a prize, 2) by chance, and 3) the giving of consideration for an opportunity to win the prize. Of the three, the court declared that "'chance' is the one which constitutes the very basis of a lottery, and without which it would not be a lottery." *City of Wink* 100 S.W.2d at 701. Although the court in *City of Wink* did not rule that "bank night" was a lottery, it did hold that "the Court of Civil Appeals had substantial grounds for the

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[4]Griffith operated a motion picture theater in the city of Wink. On one night per week, denominated "bank night," a drawing was held in the theater for which the prize was $35. A patron became "eligible" for the drawing by signing a register left open at the ticket window of the theater. Griffith contended that any person was permitted to sign the register simply by asking to do so, and thus, no consideration was *required* for the privilege of participating in the drawing. The court was not persuaded by this argument: "[The] admission charge is inseparable from the privileges enumerated [seeing the movie and participating in the drawing], which were materially different from the privileges of those who remained outside of the theater holding the so-called 'free' registration numbers." *City of Wink*, 100 S.W.2d, at 699. Furthermore, it made no difference "that a claimant's right to the prize was evidenced by a registration book instead of a ticket, as is usual in lotteries. . . . The registration numbers represented *'chances'* at the prize just as effectively as would tickets to the drawing." *Id.* (Original emphasis).

[5]At least one of the briefs construes the constitutional language to prohibit 1) lotteries, 2) gift enterprises, and 3) *"the sale of tickets in lotteries, gift enterprises or other evasions involving the lottery principle."* Under this reading, the "other evasions" language is applicable only when *tickets* are sold. As syntactically attractive as this construction might be, it is barred by the Supreme Court's unequivocal language in *City of Wink*.

conclusion to the effect that the 'Bank Night' plan of defendant in error was a lottery." *Id.*, at 699-700. Furthermore, even if "not a lottery within the meaning of the Penal Code," it was nevertheless "at the very least a gift enterprise involving the lottery principle," and, as such, was proscribed by the Constitution. *Id.* at 700.

For our purposes, however, it is sufficient to note that the Supreme Court had by 1936 laid out the definitive elements which constitute a "lottery" in the state of Texas. Texas courts have consistently found that the term "lottery" includes a wide range of activities involving the distribution of something of value by chance in exchange for valuable consideration. This construction of the term "lottery" predates our current constitution. The constitution of 1845 and every subsequent constitution have included a prohibition against lotteries. The constitutions of 1845, 1861, 1866, and 1869 stated that "No lottery shall be authorized by this State; and the buying and selling of lottery tickets within this State is prohibited." TEX. CONST. art. XII, § 36 (1869); TEX CONST. art VII, § 17 (1866); TEX CONST. art. VII, § 17 (1861); TEX. CONST. art. VII, § 17 (1845). The constitutional convention of 1875 expanded this language in response to activities authorized by the Legislature of 1873 to state that "The Legislature shall pass laws prohibiting the establishment of lotteries and gift enterprises in this State, as well as the sale of tickets in lotteries, gift enterprises, or other evasions involving the lottery principle, established or existing in other States." But even prior to the 1876 constitution, the Texas Supreme Court had found that

> it makes not the slightest difference whether it be styled a 'Gift Enterprise,' 'Book Sale,' 'Land Distribution,' or 'Art Association,' each and all are lotteries when the element of chance is connected with, or enters into the distribution of its prizes. . . . Courts will inquire *not* into

> the name, but the game, to 'determine whether it is a prohibited game.'

Randle v. State, 42 Tex. 580 (Tex. 1875) (Original emphasis). Later cases interpreted the prohibition to include bingo, raffles, sales schemes, and other giveaways, whether or not they had the three elements of "prize, chance and consideration," used by the court later to characterize a lottery. *See, e.g., City of Wink*, 100 S.W.2d 695.

In 1971, the legislature amended article 654 of the Penal Code, the criminal statute then implementing article III, section 47, to permit certain "charitable organizations to conduct lotteries for their benefit on property owned by the conducting agency" and allowing the "sale or drawing of a prize at a fair held in this State for the benefit of a church, religious society, veteran's organization," or similar entity. Acts 1971, 62d Leg., ch. 922, § 1, at 2823. As enacted, the amendment was intended to permit activities held under the aegis of a particular class of charitable or quasi-charitable institution, such as churches and veterans' organizations, that were otherwise proscribed by the Penal Code. In *Tussey v. State*, 494 S.W.2d 866, 869 (Tex. Crim. App. 1973), the court held that the language of article III, section 47, prohibited the legislature from granting this exemption. The court found that "any effort by the Legislature to authorize, license or legalize lotteries is unconstitutional in light of the constitutional provision in question. . . . Further, the Legislature is likewise prohibited from indirectly doing so by way of exemption from criminal prosecution." *Tussey v. State* 494 S.W.2d at 869; see also *City of Wink*, 100 S.W.2d 695. It is clear that the term "lottery" will be broadly construed by the courts, and that any game newly sanctioned by the legislature must be carefully scrutinized to determine whether it is a "lottery." If it is, it cannot be lawfully operated without a constitutional amendment.

Subsequent to the court's decision in *Tussey*, the legislature proposed, and the electorate approved, a series of amendments to article III, section 47. A 1980 amendment—the present subsections (b) and (c) of article III, section 47-excepted "bingo games conducted by a church, synagogue, religious society, volunteer fire department, nonprofit veterans organization, fraternal organization, or nonprofit organization supporting medical research or treatment programs." S.J.R. 18, Acts 1979, 66th Leg., at 3221. Subsection (d) was added in 1989 to permit "charitable raffles" held by those entities which were already authorized to conduct bingo games. H.J.R. 32, § 1, Acts 1989, 71st Leg., at 6427. The most recent amendment, subsection (e), permits the legislature to "authorize the State to operate lotteries and [to] authorize the State to enter into a contract with one or more legal entities that will operate lotteries on behalf of the State." H.J.R. 8, Acts 1991, 72d Leg., 1st C.S., at A-2.

"Lottery" is defined in section 47.01(6) of the Penal Code as

> any scheme or procedure whereby one or more prizes are distributed by chance among persons who have paid or promised consideration for a chance to win anything of value, whether such scheme or procedure is called a pool, lottery, raffle, gift, gift enterprise, sale, policy game, or some other name.

Attorney General Opinion JM-1267 (1990) considered whether a variety of "casino games," including "slot machines," could be validated by the legislature without the necessity of amending article III, section 47. The opinion "assume[d] that two of the necessary three elements of a lottery would be present during the holding of the gaming activities" described in the opinion—"i.e., the payment of

consideration and the awarding of a prize"—and that the constitutionality of a particular game would be determined according to whether, and to what extent, it contained the element of *chance*.

Opinion JM-1267, relying on judicial decisions and Attorney General Opinion C-619 (1966), declared that the characterization of a particular game as a "lottery" is dependent upon "whether the ***dominating element*** of the entire scheme was that of chance, or that of skill, judgment, or ingenuity." Quoting from *Sherwood & Roberts-Yakima, Inc. v. Clyde G. Leach*, 409 P.2d 160 (Wash. 1965), Opinion C-619 stated that "[i]f chance predominates over skill or judgment and permeates the whole plan, a lottery is established." *See Adams v. Antonio*, 88 S.W.2d 503 (Tex. Civ. App.—Waco 1935, writ ref'd).

As this office stated in JM-1267, section 47 of article III does not "proscribe *all* forms of gambling." Pari-mutuel betting on horse or dog races, for example, although it may contain some element of chance, also depends, at least in part, on the bettor's skill. *See Panas v. Texas Breeders & Racing Ass'n*, 80 S.W.2d 1020 (Tex. Civ. App.—Galveston 1935, writ dism'd); *see also, Ginsberg v. Centennial Turf Club, Inc.*, 251 P.2d 926 (Colo. 1952); *People ex rel. Lawrence v. Fallon*, 46 N.E. 296 (N.Y. 1897). Opinion JM-1267 did not resolve whether any of the games at issue there "involve[d] the dominating element of skill, as opposed to chance," since resolution of that question was deemed to require findings of fact not appropriate to the opinion process. If, however, it can be determined that the slot machine pay out is based entirely on chance rather than skill, we can say that the operation of that device constitutes a "lottery" *as a matter of law*. *See State v. Fry*, 867 S.W.2d 398 (Tex. App.—Houston [14th Dist.] 1993, writ. ref.); *State v. Mendel*, 871 S.W.2d 906 (Tex. App.-Houston [14th Dist.] 1994, n.w.h.)..

Your request letter expresses your "understanding" that

> [w]hether the player wins or not depends entirely on chance and is not affected by any skill, judgment, or knowledge of the player.

In our opinion, this is a fair characterization of the device commonly referred to as a "slot machine." In a very recent opinion, the Attorney General of Kentucky held it to be "immediately apparent" that slot machines, as well as such games as roulette and craps, are purely games of chance:

> No one can know what the next pull on the handle, spin of the wheel, or throw of the dice will produce. It is impossible under these games as we know them for any player, no matter how skillful, to destroy the element of chance. They are lotteries, and in the case of slot machines, have routinely been held so.

Attorney General of Kentucky, Opinion No. 93-58 (1993).

Furthermore, the odds of "winning" are the same for every play. No matter how many games a player has played and lost, his odds of winning on the *next* pull of the handle remain unchanged. It is clear that operation of a "slot machine" which functions in the manner described herein, is, as a matter of law, a "lottery" for purposes of section 47 of article III of the Texas Constitution, and accordingly, may not be authorized by the legislature in the absence of a constitutional amendment.[6]

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[6]Some of the briefs also contend that the legislature may simply redefine "lottery" to exempt from its purview the operation of slot machines. The briefers rely on *Panas v. Texas Breeders & Racing Ass'n*, 80 S.W.2d 1020 (Tex. Civ. App.-Galveston 1935, writ dism'd) to

Representative Thompson asks whether, if the legislature is prohibited from directly authorizing private individuals and companies to operate slot machines within the state, it may authorize the state itself to do so and to contract with one or more entities that will operate the machines on behalf of the state. Representative Thompson's inquiry is prompted by the 1991 amendment to article III, section 47-the present subsection (e)-which authorized the state lottery:

> (e) The Legislature by general law may authorize the State to operate lotteries and may authorize the State to enter into a contract with one or more legal entities that will operate lotteries on behalf of the State.

Some have argued that the State Lottery Commission may authorize its lottery operator to append "slot machines" to its repertoire of games, even in the absence of further statutory intervention. Indeed, it has even been suggested that some of the games currently being conducted are in fact "slot machines" in all but name.[7] As we will demonstrate,

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support their position. In that case, the court determined that the legislature was constitutionally authorized to permit betting on horse races. As we have indicated, however, *supra*, pari-mutuel betting on horse or dog races is not entirely a game of chance. The legislature is not empowered to statutorily remove from the definition of "lottery" a game which inarguably conforms to the constitutional meaning of "lottery."

[7]The State Lottery Act defines "lottery" as "the procedures operated by the state under this chapter through which prizes are awarded or distributed by chance among persons who have paid, or unconditionally agreed to pay, for a chance or other opportunity to receive a prize." Gov't Code § 466.002(3).

such hypertechnical arguments cannot survive serious scrutiny.

In our view, the circumstances surrounding the adoption of subsection (e) make it abundantly clear that the voters who approved proposition 11 on the general election ballot of November 5, 1991, did not intend to legalize the operation of slot machines, whether by a private individual or company, by the state, or by a private individual or company on behalf of the state.

The joint resolution which placed the lottery amendment on the ballot, H.J.R. 8, Acts 1991, 72 Leg., 1st C.S., at A-2. used the language which now appears as subsection (e) of article III, section 47, i.e., "[t]he legislature by general law may authorize the State to operate *lotteries* . . . ." (Emphasis added).[8] However, the joint resolution read as follows:

> SECTION 2. This proposed constitutional amendment shall be submitted to the voters at an election to be held on November 5, 1991. The ballot shall be printed to provide for voting for or against the proposition: 'The constitutional amendment authorizing *a state lottery*.'

Id. (emphasis added). We believe it is self-evident that voters presumed from the ballot language that they were voting for or against the common *perception* of a "state lottery," as denoted by the clear language of the ballot proposition, rather than a broad spectrum of games which embody the "lottery principle," as articulated by *City of Wink*, *Tussey*, and

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[8]Tapes of the House debate on the second and third readings of H.J.R. 8 contain no reference whatever to slot machines.

numerous other judicial decisions. This view is amply supported by extrinsic evidence from contemporary newspaper accounts.

First, every newspaper article and editorial to which we have been directed refers to "a state lottery," "a lottery," or "a state-run lottery." *See, e.g., Austin American-Statesman,* November 1, 1991, November 3, 1991, November 6, 1991. In addition, the articles make frequent reference to other governmental bodies which have previously adopted "lotteries," *e.g.,* Washington D.C., and New York State, neither of which permit government-operated slot machines. *Dallas Morning News,* November 1, 1991. Revenue estimates mentioned in newspaper accounts are based on the experience of other states which have conventional lotteries involving the purchase of lottery tickets and drawings for winning numbers. *Id.*

Some accounts also refer to the proposed state lottery as a "numbers game." *Houston Chronicle,* November 4, 1991; *Dallas Morning News,* November 3, 1991. The term "numbers game" has been authoritatively described as United States slang for "an illegal form of gambling in which bets are taken on the occurrence of numbers in a lottery or in the financial columns of a newspaper." Oxford English Dictionary, 2d ed., 1989, v. 10, at 590. The *OED* reference notes the use of the term as early as 1897 and as recently as 1975. We have found no evidence that the term "numbers game" has ever been used to refer to a "slot machine." Furthermore, some contemporary newspaper accounts make the point that the adoption of the lottery amendment will permit more than one form of "game," beginning with "scratch-off" lottery tickets," and progressing to "the big-money, computer-driven lotto games . . . ." *Dallas Morning News,* November 5, 1991; *see also, Austin American-Statesman,* November 6, 1991. We believe it is significant that *none* of the articles cited make any reference to "slot machines."

There are well-established principles of constitutional construction that apply in answering Representative Thompson's question. It must be determined whether the constitutional language is "plain and definite" and thus not subject to further interpretation. It is clear, as stated above, that the language voted upon by the electorate, that is, "The constitutional amendment authorizing *a state lottery*," is plain and definite. The constitutional amendment as passed by the voters does not include slot machines. Some have suggested, however, that the term "lotteries" as contained in subsection (e) should be interpreted as broadly as the courts have interpreted the same term in subsection (a). Assuming for the sake of argument that further interpretation is necessary, then we may apply principles of constitutional construction established by our courts in our consideration of the term, the first and most important of which is to give intent to the voters who adopted it. Based on the extrinsic evidence cited above, we do not believe the intent of the voters in approving the proposition, "The constitutional amendment authorizing *a state lottery*," (H.J.R. 8, *supra*, emphasis added) was to authorize slot machines.

> The fundamental rule for the government of courts in the interpretation or construction of a Constitution is to give effect to the intent of the people who adopted it. The meaning of a Constitution is fixed when it is adopted; and it is not different at any subsequent time when a court has occasion to pass upon it. Where its terms are plain and definite, that which the words declare is the meaning of the instrument. In such cases there is no room for construction; the words of the instrument lie before the court already molded to their use, and its

> province extends no further than the enforcement of the language as written.

Cox v. Robinson, 150 S.W. 1149, 1151 (Tex. 1912) (citations omitted).

In *San Antonio Independent School Dist. v. State*, 173 S.W. 525 (Tex. Civ. App.—San Antonio 1915), the court declared:

> [A] state Constitution should not receive a technical construction like a statute, but that rule of interpretation should be followed which carries out the apparent intention of the people who enacted it.

To construe the term "lotteries" in subsection (e) to include slot machines, would require applying a technical construction to the word "lotteries" derived from the case law which was not before the voters in 1991. Nor does the language placed before the voters suggest, on its face, such a construction. "[T]hose who are called upon to construe the [c]onstitution are not authorized to thwart the will of the people by reading into the [c]onstitution language not contained therein." *Cramer v. Shappard*, 167 S.W.2d 147, 154 (Tex. 1945). "It does not follow, either logically or grammatically, that, because a word is found in one sense in one connection in a [c]onstitution, therefore, the same sense is to be adapted in every other connection in which it occurs. Story on Constitution, § 454. *Koy v. Schneider*, 221 S.W. 880. 914 (Tex. 1950). Far less should the construction of a word approved by voters separated in time by more than a century be construed without reference to the context in which it was used and the intention it expressed.

Rather, we should construe the language of the exception in light of our contempory situation, by limiting the meaning of the term "lottery" as approved by the voters in

1991 to its plain meaning. To do otherwise, is to allow the exception to swallow the rule. We decline to give the language of subsection (e) so unreasonable a construction when a more sensible one suggests itself, especially when the more sensible interpretation gives effect to the proposition actually presented to the voters. If the proposition passed by the legislature and presented to the voters had been intended and understood to authorize state-operated casinos, it would have been a simple matter for the language to reflect that intention.[9]

However, again for the purpose of argument, another principle of constitutional construction that may be applied to the construction of the word "lotteries" in subsection (e) is the rule of *ejusdem generis*, which result in the same above mentioned conclusion.

> [W]here general words follow an enumeration of persons or things by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but

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[9] There were two proposals to amend the constitution to allow casino gaming before the legislature in 1993. Both House Joint Resolution 4 and House Bill 105 clearly articulate constitutional proposals to allow charity casino gaming. Neither bill uses the term "lottery" in its generic sense applied by the case law to express the purpose of allowing gaming activities not currently included in the exceptions to article III, section 47. House Bill 105, in fact, includes the term lottery in a list of activities consisting of pari-mutuel wagering, bingo, charitable raffles, and a sports pool, all of which are *specifically excluded* from the definition of casino gaming. The language proposed to be put before the voters was "The constitutional amendment authorizing casino gaming by charitable organizations." Tex. H.J.R. 4, 73d Leg. (1993). Clearly it would be absurd to impute to either the legislature or the voters the intention to include casino gaming in the phrase "a state lottery" as used in the constitutional amendment proposition that passed in 1991 when, with so little confusion and difficulty, it could have been put before the voters in plain and direct language, as House Joint Resolution 4 would have, had it passed the legislature.

> are to be held as applying only to persons or things of the same kind or class as those specifically mentioned.

San Antonio I.S.D. v. State, 173 S.W. at 527. Simply put, the term "lotteries" is the third of three specific exceptions to the general prohibition against "lotteries and gift enterprises." Therefore, the term "lotteries" in subsection (e) may not be given its widest meaning but must be construed as belonging to the same "class" or category as charitable bingo and charitable raffles. Considered as the third in a series of narrowly circumscribed activities, the term "state-operated lotteries" would have to be understood to be a specific activity, and not to mean the entire class of activities to which bingo and raffles also belong. To read the amendment otherwise would lead to an absurd result. "[C]onstitutional and statutory provisions will not be so construed or interpreted as to lead to absurd conclusions . . . if any other conclusion or interpretation can reasonably be indulged in." *Cramer v. Sheppard*, 167 S.W.2d 147, 155 (Tex. 1943).

The term "slot machine," with its associated images of Las Vegas-style casinos, evokes intense emotion in many individuals who look upon a "state lottery" as a harmless, even benign, method of raising state revenue, one which is qualitatively different from the concept of "slot machine." No evidence has been presented that any portion of the electorate believed that, in approving the amendment for a "state lottery," it was thereby sanctioning slot machines. And as indicated, *supra*, a great deal of evidence suggests that the voters who adopted the lottery amendment intended thereby to authorize only the traditional form of "state lottery." We conclude, therefore, that subsection (e) of article III, section 47, does not empower the legislature to permit the state itself to operate slot machines, nor does it authorize the legislature to permit the state to contract with one or more entities that will operate the machines on the state's behalf.

Representative Thompson also asks whether the legislature may permit private individuals or entities to operate slot machines "on a riverboat or dockside casino" merely by amending the definition of "bet" in section 47.01(1) of the Penal Code. As we have noted, the legislature may not, in light of the constitutional prohibition against "lotteries," validate slot machines simply by re-defining the term "lottery" to exclude slot machines from its purview. In our opinion, this principle applies equally to the definition of "bet." Article III, section 47, directs the legislature to "pass laws prohibiting the establishment of lotteries." Clearly, this constitutional provision is not self-enacting, and, had the legislature never enacted any implementing legislation, suit would not lie to compel enactment. However, where there is a history of penal statutes implementing the constitutional prohibition , repeal of one of those prohibitions is not a neutral act, and, in our opinion, such repeal would contravene the constitutional proscription of subsection (a) of section 47 of article III. We conclude, therefore, that the legislature may not legalize the operation of slot machines by private entities merely by amending the definition of "bet" in section 47.01(1) of the Penal Code.

SUMMARY

A "slot machine," as that term is commonly understood, is a device which awards cash or other prizes solely on the basis of chance, and is not affected by any skill, judgment, or knowledge of a particular player. As such, it constitutes an unlawful lottery in contravention of article III, section 47 of the Texas Constitution. Operation of "slot machines" may not be authorized by the legislature in the absence of a constitutional amendment. Furthermore, subsection (e) of article III,

section 47, does not authorize the legislature either to permit operation of slot machines *by the state*, or to permit the state to contract with one or more entities to operate slot machines *on behalf of the state*. The legislature may not legalize the operation of slot machines by private entities merely by amending the definition of "bet" in section 47.01(1) of the Penal Code.

Very truly yours,

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No. 94-1161

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

YSLETA DEL SUR PUEBLO,
Petitioner,

v.

STATE OF TEXAS and ANN RICHARDS,
GOVERNOR OF THE STATE OF TEXAS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. IGRA AND THE ELEVENTH AMENDMENT

Respondents are correct in stating that their appeal to the Fifth Circuit involves the important issue of whether the Indian Gaming Regulatory Act (IGRA)[1] violated the Eleventh Amendment.[2] Following the filing of the Tribe's Petition (and Respondents' Cross-Petition), this Court granted certiorari on the same issue in *Seminole Tribe of Indians v. Florida,* U.S. Supreme Court No. 94-12, petition for certiorari granted, 63 U.S.L.W. 3556, 3562 (January 23, 1995). Because the issues are so closely related, the

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[1] 25 U.S.C. § 2701-21 and 18 U.S.C. § 1166-1168.

[2] U.S. Const. amend. XI.

Tribe requests that this case be consolidated with *Seminole* to resolve the relationship between IGRA and the Eleventh Amendment.

Petitioner is the Ysleta del Sur Pueblo (Tribe), an Indian tribe as defined by IGRA. Respondents are the State of Texas and its Governor (State). But the Tribe and State agree that the Fifth Circuit was incorrect in avoiding the important issue of the impact of the Eleventh Amendment on IGRA. The Fifth Circuit instead decided that the Restoration Act,[3] which restored federal recognition to the Tribe, completely controls. The Court noted that Congress has the power to abrogate the State's Eleventh Amendment immunity, but found that the Restoration Act does not contain an abrogation clause like IGRA's. Although the Tribe and State disagree as to the total reach of IGRA, all parties to this case agree that the Fifth Circuit was incorrect in ruling that the Restoration Act eliminates any role for IGRA in Indian gaming on the Tribe's land in Texas.

The Tribe argues that IGRA occupies the entire field of Indian gaming; it is the single federal statute designed to regulate all Indian gaming in this country. The State argues that the Restoration Act has not been completely preempted by IGRA, but that it defines the scope of gaming for negotiations under IGRA. By holding that the Restoration Act eliminates any role for IGRA, the Fifth Circuit has left both the Tribe and Texas without any guidance as to how to regulate gaming on the Tribe's land, or even how to determine what forms of gaming are allowed. The only option left the Tribe to determine whether its requested gaming activities are "prohibited by the laws of the state of Texas," is to risk criminal sanction by conducting the activities.

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[3] 25 U.S.C. §§ 731 et seq. and 1300g et seq.

At page 2 of its Brief, the State asserts that "the Restoration Act and IGRA should be harmonized by allowing IGRA to govern the procedures by which the Ysleta del Sur Pueblo could pursue gaming while allowing the Restoration Act to govern the substantive question regarding which gaming activities were allowed." Brief at p. 2 (footnote omitted). The State urges the same position in Question II of its Conditional Cross-Petition for Writ of Certiorari. In short, the State concedes that IGRA, for some purposes, controls gaming on the Tribes' reservation. The Tribe argues that IGRA governs gaming on the reservation for all purposes.

The State, like the Tribe, argues that the Fifth Circuit's decision should be reversed. But, following reversal, Texas would then like to re-litigate what forms of Class III gaming are allowed under IGRA. The State ignores the fact that this exact issue has been decided as a factual determination by the trial court. If this Court reverses the Fifth Circuit's holding, as all parties agree it should, the result should not be a new trial but merely the re-establishment of the trial court's detailed determination of the scope of gaming in Texas under IGRA.

II. THE FIFTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH DECISIONS OF TWO OTHER CIRCUITS

Respondents attempt to distinguish the decision of the Fifth Circuit from those in *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir.), *cert. denied*, 115 S. Ct. 298 (1994), and *United Keetowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170 (10th Cir. 1991). The State disregards the underlying principle shaping the opinions in those two decisions:

> [T]he very structure of [IGRA] forbids the assertion of state civil or criminal jurisdiction over class III gaming except when the tribe and the state have negotiated a compact that permits state intervention.

Narragansett, at 690, citing *Keetowah*, at 1177. There is no way to reconcile these holdings with the Fifth Circuit's holding that IGRA plays no role in the assertion of state jurisdiction over class III gaming by two Tribes [4] in Texas.

The First and Tenth Circuits held that IGRA controlled wherever it was in conflict with other federal statutes involving Indian gaming. The Fifth Circuit held the opposite, that IGRA does not control when it was in conflict with another federal statute. Admittedly, the statutes involved in *Narragansett* and *Keetowah* are different from the Tribe's Restoration Act. But the reach of those statutes shows the conflict among federal courts of appeal.

In *Narragansett*, the First Circuit construed the statute in conflict, the Rhode Island Indian Claims Settlement Act of 1978,[5] as granting full state criminal and civil jurisdiction,[6] even including regulatory jurisdiction, over that Tribe's land. Yet, the First Circuit held that IGRA controlled over the Settlement Act.

Under the Restoration Act, Texas enjoys full criminal jurisdiction over the Tribe's land.[7] However, there is no grant of general civil jurisdiction, as there was in the Rhode Island statute. Yet, the Fifth Circuit held that the Restoration Act controlled over IGRA.

In *Keetowah*, the Tenth Circuit construed the Assimilative Crimes Act [8] as not only making certain criminal laws of Oklahoma applicable as federal law on federal enclaves in Oklahoma, but as also allowing Oklahoma to criminally prosecute violations of that Act. Nevertheless, the Tenth

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[4] The Alabama-Coushatta Indian Tribe of Texas is subject to the same restrictions on gaming as the plaintiff Tribe in this case. 25 U.S.C. § 737.

[5] 25 U.S.C. 1701-1716.

[6] See, 25 U.S.C. 1708.

[7] 25 U.S.C. § 1300g-6(a).

[8] 18 U.S.C. § 13.

Circuit held the Assimilative Crimes Act had to give way to IGRA.

The Restoration Act, makes certain of the laws of Texas applicable as federal law on the Tribe's reservation in Texas. Notwithstanding, Texas cannot prosecute violations of the Act. Unlike the power given Oklahoma under the Assimilative Crimes Act, Texas's ability to enforce the Restoration Act is limited to civil suits for injunctive relief.[9] Nevertheless, the Fifth Circuit held IGRA had to give way to the Restoration Act.

Both the First and Tenth Circuit Courts of Appeal held that IGRA not only circumscribed the application of the previously enacted statutes at issue, but implicitly repealed any contrary provisions as well. Such decisions were mandated in order to give full effect to Congressional intent to establish in IGRA the national policy on Indian gaming. *Narragansett*, at 690.

In its Brief in Response to the Tribe's Petition for Writ of Certiorari, the State provides this Court with the following faulty analysis [10] of the *Narragansett* decision:

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[9] 25 U.S.C. § 1300g-6.

[10] The Brief of Respondents is replete with faulty analysis. First and foremost, the Respondents appear to argue a point not ruled on by the Fifth Circuit and not in issue in the Tribe's Petition for Writ of Certiorari: that the district court erred in holding that the Tribe's requested gaming activities are not prohibited by Texas and thus are not prohibited by the Tribe's Restoration Act. Contrary to the State's assertion, the Fifth Circuit never held that the Tribe is not entitled to pursue its requested gaming activities.

Respondents state at page three of their Brief that the "Fifth Circuit correctly decided that the Ysleta del Sur Pueblo is not entitled to pursue casino gambling in Texas." The Fifth Circuit never made such a finding. Although the Fifth Circuit did hold that § 1300g-6(a) of the Restoration Act did not codify the *Cabazon* test, the court never disturbed the trial court's finding that the Restoration Act did not prohibit the Tribe's requested gaming activities. The applicability of the *Cabazon* test is immaterial because the trial court did not rely on that test in determining

> The First Circuit implies that there could be a consensual transfer in the gaming area, albeit of criminal jurisdiction, which survives IGRA. This reasoning undermines the Tribe's position that no previous Act of Congress has independent meaning in the area of gaming after the passage of IGRA. *Rhode Island*, 19 F.3d at 697.

The statements of Respondents leave the impression that there was a grant of criminal jurisdiction to Rhode Island over gaming matters left unaffected by IGRA. Such was not the holding of the First Circuit. Instead, that Court held that IGRA repealed the State's jurisdiction over Indian lands for Class I and Class II gaming and limited the State's jurisdiction over Class III gaming to the Tribal-State compacting process created by IGRA. *Narragansett*, at 704. In short, the First Circuit placed Rhode Island in the same position as every other State, when it comes to regulating Indian gaming after the enactment of IGRA. By contrast, the effect of the Fifth Circuit's decision is to treat Texas differently from the other forty-nine States, at least with respect to two of the three Indian Tribes in the State.

III. THE FIFTH CIRCUIT'S DECISION WILL RESULT IN DISCRIMINATORY TREATMENT AMONG INDIAN TRIBES

The Fifth Circuit's decision to treat Texas differently from all other States will inevitably result in discriminatory treatment among the federally recognized Indian tribes of the nation and even among those located within a single State. The Fifth Circuit held the gaming provisions of the Restoration Act control gaming on the Tribe's land. The Alabama-Coushatta Indian Tribe of Texas is

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that the Tribe's requested gaming activities are not prohibited by the Restoration Act. Furthermore, because the Fifth Circuit resolved the appeal on a conflict in the enforcement procedures (not the scope of gaming provisions) between the two statutes, its conclusion concerning the scope of gaming permitted under the Restoration Act is reduced to dicta.

subject to those same gaming provisions.[11] But, a third federally recognized Tribe in Texas, the Texas Band of Kickapoo Indians, has requested the right to engage in Class III gaming. The Kickapoos have a federal recognition act which is devoid of any similar gaming provisions.[12] IGRA thus governs gaming by the Kickapoos of Texas, but not the other two Tribes in the State.

CONCLUSION

If this Court lets the Fifth Circuit's decision stand, while upholding IGRA against its Eleventh Amendment challenge, it will be creating two standards for Indian gaming. Although IGRA will apply to almost every Tribe and every piece of Indian land in the United States, even those subject to prior restrictive federal acts, it will not apply to certain Tribes unlucky enough to fall within the grasp of the Fifth Circuit.

Respectfully submitted,

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[11] 25 U.S.C. § 737.

[12] 25 U.S.C. § 1300b-11 et seq.